(8)

No. 83-2143-CSY
Status: GRANTED

Title: Tennessee, Petitioner
v.
Harvey J. Street

Docketed:
June 29, 1984

Court: Court of Criminal Appeals of Tennessee, Eastern District

Counsel for petitioner: Cody, W.J. Michael

Counsel for respondent: Hampton, Stuart

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1984	G	Petition for writ of certiorari filed.
3	Aug 1 1984		DISTRIBUTED. September 24, 1984
4	Aug 24 1984	F	Response requested.
5	Sep 20 1984		Brief of respondent Harvey J. Street in opposition filed.
6	Sep 26 1984		REDISTRIBUTED. October 12, 1984
8	Oct 18 1984		REDISTRIBUTED. October 26, 1984
9	Jan 3 1985		Petition GRANTED.
			**********
11	Dec 10 1984		Order extending time to file response to petition until December 26, 1984.
13	Dec 10 1984		Order extending time to file response to petition until February 4, 1985.
14	Dec 24 1984		Brief of petitioner Tennessee filed.
15	Dec 24 1984		Appendix of United States filed.
16	Dec 24 1984	G	Motion of respondent for appointment of counsel filed.
17	Dec 26 1984		Brief amicus curiae of United States filed.
19	Jan 3 1985		Record filed.
20	Jan 7 1985		Motion for appointment of counsel GRANTED and it is ordered that George Stuart Hampton, Esquire, of Elizabethtown, Tennessee, is appointed to serve as counsel for the respondent in this case.
21	Jan 3 1985		Record filed.
22	Jan 11 1985	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Jan 21 1985		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Powell OUT.
24	Feb 5 1985		SET FOR ARGUMENT. Monday, March 18, 1985. (1st case).
25	Feb 15 1985		Brief of respondent Harvey J. Street filed.
26	Feb 28 1985		CIRCULATED.
27	Mar 11 1985	X	Reply brief of petitioner Tennessee filed.
28	Mar 18 1985		ARGUED.

1 44

83-2143

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of Tennessee at Knoxville

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. LEECH, JR.
Attorney General of Tennessee

ROBERT A. GRUNOW
Deputy Attorney General
Counsel of Record

WAYNE E. UHL
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-7087

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

28 pp

QUESTION PRESENTED FOR REVIEW

Whether the admission of a nontestifying accomplice's interlocking confession, on rebuttal, solely to impeach the defendant's false claim that his own statement was a coerced imitation of the accomplice's confession, violates the defendant's right to confrontation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of Tennessee at Knoxville

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee at Knoxville, not yet reported, was rendered on January 25, 1984. The opinion appears as Appendix A.

The order of the Supreme Court of Tennessee, denying discretionary review under Tenn. R. App. P. 11, was filed on April 30, 1984. It appears as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on January 25, 1984. Discretionary review was sought in the Supreme Court of Tennessee, and was denied on April 30, 1984. This petition was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ..

STATEMENT OF THE CASE

The victim, 72-year-old Ben Tester, was last seen alive walking toward his house in Hampton, Tennessee at about 8:45 p.m. on August 26, 1981. His body was found the next day, hanging by a nylon rope from an apple tree in his back yard. His house had been broken into through a front porch window and the house had been ransacked. A gag in Tester's mouth had apparently been torn from a sheet in the house.

Respondent Harvey J. "Joe" Street, a juvenile at the time of the murder, was transferred to criminal court to be tried as an adult and was indicted jointly with several others, including Clifford Peele. The indictment charged murder in the first degree in a single count which alleged both that the killing was premeditated and that it had been committed during the

perpetration of a felony.[1] Street's case was severed from those of the other defendants, and venue was changed to Unicoi County.

The State's chief evidence was a voluntary confession Street made to police on September 17, 1981.[2] The extremely detailed statement related that Street, Clifford Peele, and two other young men planned and executed the burglary of the victim's house. Street claimed that he had told Peele he would not "do his part" if the victim discovered them, but part of their joint plans included the purchase of nylon rope. Street admitted in the statement that he had willingly assisted in the burglary and ransacking of the house.

Street's statement described how Peele had jumped on and struggled with Tester when Tester surprised the burglars by walking into the house, and Street claimed that he then ran out of the house and told Peele they should leave. At the insistence of the other burglars, however, Street returned to the house and assisted by making a gag for the unconscious victim's mouth.

Finally, Street described in the statement how Tester had been carried out of the house, stood on the tailgate of a pickup truck,

---

[1] Tenn. Code Ann. § 39-2-202(a):

> Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

[2] Street challenged the admissibility of the confession, but the Tennessee Court of Criminal Appeals held that the trial court's findings of a knowing waiver and voluntariness were supported by the record. Street did not appeal this issue to the Tennessee Supreme Court.

and hanged. Street said that he got up in the truck and watched the hanging, but he specified that the others had actually tied the rope to the tree, put the noose around Tester's neck, and pushed Tester off the tailgate.

Other proof presented by the State corroborated the confession, particularly by the subsequent condition of the crime scene, which was just as Street had described it. There was also proof of statements made by Street after the killing in which he admitted to knowing the location of certain physical evidence and in which he admitted placing the rope around the victim's neck.

Street atempted to set up an alibi defense. He testified that he spent the day with Peele, but was not with Peele that night and was not at the scene of the murder.

Street also recanted his confession, claiming that one of the officers present at its taking (the sheriff) had pressured Street to adopt verbatim a statement Clifford Peele had given the day before. Specifically, the sheriff would read a portion of Peele's statement and instruct Street to "say something similar to this." Street also claimed that he was angrily accused of "telling a damn lie" whenever Street's oral statements differed from Peele's written statement.

In rebuttal, the State introduced Peele's statement through the sheriff, who testified that he had not pressured Street in any way. Peele's statement also detailed Street's assistance in the planning and execution of the burglary. According to Peele, both he and Street jumped Tester and then ran outside, where a third burglar convinced them to help in the murder. All four burglars carried Tester out to the truck, and Street helped to stand Tester up and placed the rope around his neck.

The jury was twice instructed not to consider Peele's statement for its own truthfulness. The emphasis of the State's questioning of the sheriff was the existence of discrepancies between

the confessions. The State's references to Peele's statement during closing arguments were also carefully limited to its impeachment value.

The jury returned a general verdict of guilt of first-degree murder, without specifying whether it had relied on premeditation or felony murder. Because he was a transferred juvenile, Street could not receive a death sentence, Tenn. Code Ann. § 37-1-134(a)(1), and he therefore received an automatic life sentence.

In reversing Street's conviction, the Tennessee Court of Criminal Appeals agreed that Peele's statement was not hearsay, but held that its introduction nonetheless violated Street's right to confrontation. The state appellate court rejected the State's argument that the two confessions were "interlocking," holding that Peele's confession made Street "much more a principal actor" than had Street's own confession. The court also concluded that what it called the "Interlocking Confessions Doctrine" applied only to joint trials. Finally, the court refused to find harmless error.

REASONS FOR GRANTING THE WRIT

The Tennessee Court Of Criminal Appeals Erroneously Found A Violation Of The Confrontation Clause In The Introduction Of An Accomplice's Interlocking Confession For Impeachment Purposes.

The state appellate court has misapplied the Confrontation Clause as interpreted by the Court in *Bruton v. United States,* 391 U.S. 123 (1968), and *Parker v. Randolph,* 442 U.S. 62 (1979). Furthermore, this Court should take this opportunity to clarify the split decision in *Parker,* which left federal and state courts with a harmless error rule in the application of the Sixth Amendment. Therefore this Court should grant the writ of certiorari and review the issue presented in this case.

In *Bruton,* this Court held that the highly inculpatory confession of a nontestifying co-defendant should not have been admitted in a joint trial with the defendant, who had not confessed his participation in the crime. Although the trial judge in *Bruton* had instructed the jury to consider the confession only against the confessor, this Court held that instruction to be ineffective since the confession had been "devastating" to Bruton's defense and had added "substantial, perhaps even critical, weight to the government's case in a form not subject to cross-examination . . .." 391 U.S. at 128, 136.

In 1975 the Tennessee Supreme Court suggested that *Bruton* would not be violated unless the co-defendant's confession exposed the defendant to "an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment. . .." *State v. Elliott,* 524 S.W.2d 473, 478 (Tenn. 1975). Because Elliott had confessed only to driving a second getaway car, however, and had denied being near the scene of the crime, the introduction of the co-defendant's inculpatory confession was held to be a harmless violation of *Bruton.*

This Court addressed the question of "interlocking" confessions in *Parker v. Randolph,* 442 U.S. 62 (1979). Four Justices[1] opined that *Bruton* is not violated by such a confession, reasoning that the co-defendant's confession is no longer "devastating" if the defendant has also confessed to participation in the crime. A fifth Justice, forming a majority, agreed only that the introduction of an "interlocking" confession was at most harmless error. 442 U.S. at 77-82 (Blackmun, J. concurring). Three Justices dissented, 442 U.S. at 81, and Justice Powell did not participate, 442 U.S. at 77.

The instant case is an excellent example of a lower court's misunderstanding of *Bruton* and confusion over the meaning of *Parker.* When respondent Street took the stand in his own defense, his claim of alibi had already been "devastated" by the introduction of his own detailed and highly reliable confession. By his own confession Street willingly assisted in burglarizing the victim's home, and at least aided and abetted the others in murdering the victim. He was therefore at least guilty of felony murder, which is first-degree murder and punishable (in Street's case) only by life imprisonment.

Peele's confession did nothing to increase the risk of conviction or higher punishment. Minor differences such as who actually placed the rope around Tester's neck were irrelevant, especially since Street presented an alibi defense and did not give the jury an option to find a reduced grade of homicide.

The lower court's decision is even more disturbing in that it allows a defendant to use the confrontation right to distort the truth-finding function of the criminal trial. Street will now be able to take the stand and make his false claim that he was forced to parrot Peele's confession, confident in the knowledge that

---

[1] Justice Rehnquist was joined by Chief Justice Burger, Justice Stewart, and Justice White.

the State will be unable to impeach him with the confession itself. For the same reasons that prearrest silence may be used to impeach a defendant, *Jenkins v. Anderson,* 447 U.S. 231 (1980), and that a *Miranda*-violated voluntary statement may be used for the same limited purpose, *Harris v. New York,* 401 U.S. 222 (1971), and *Oregon v. Hass,* 420 U.S. 714 (1975), this Court should consider whether Peele's confession in this case was properly used solely to impeach Street's contrary testimony.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General of Tennessee

ROBERT A. GRUNOW
Deputy Attorney General

WAYNE E. UHL
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-7087

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE, KNOXVILLE

NOVEMBER 1983

No. 25
Unicoi Criminal

State of Tennessee,
Appellee,

V.

Harvey J. Street,
Appellant.

Honorable Arden L. Hill, Judge
(First Degree Murder)

For the Appellee:

William M. Leech, Jr.
Attorney General
Nashville, Tennessee

Wayne E. Uhl
Assistant Attorney General
Nashville, Tennessee

David Crockett
District Attorney General
Elizabethton, Tennessee

Lynn Brown
Assistant District Attorney
General
Elizabethton, Tennessee

For the Appellant:

Bill Hampton
Stuart Hampton
Elizabethton, Tennessee

REVERSED AND REMANDED

MARK A. WALKER, PRESIDING JUDGE

FILED: JAN. 25, 1984

OPINION

The appellant, Harvey G. Street, was convicted of first degree murder and sentenced to life imprisonment. The case is before us on delayed appeal after his earlier direct appeal had been dismissed because of Street's untimely notice of appeal.

The killing in this case occurred in Carter County on the night of August 26, 1981, about three months after Street's 17th birthday. After a hearing in the Carter County Juvenile Court, jurisdiction was transferred to criminal court for Street's trial as an adult.

The Carter County grand jury jointly charged Street and five others with the first degree murder of Ben W. Tester, both premeditated and in the perpetration of a burglary. Street's appointed counsel moved for a change of venue, and it was changed to Unicoi County. The trial court denied Street's motion to suppress evidence of his confession. Street's separate trial on July 19 - 22, 1982, resulted in his conviction.

On appeal Street presents two issues: (1) The court erred in holding that his confession was voluntary and admitting it into evidence. With this argument he also contends that he was denied the right to counsel; and (2) that he was denied his constitutional right to confront the witnesses against him by the admission into evidence of the out of court statement of Clifford Peele implicating him in the murder. We find that the case must be reversed on the second issue.

On August 27, 1981, Ben Tester was found dead, gagged and hanging by the neck from a tree in his yard in Hampton, Tennessee. A window screen had been cut, and the victim's home forcibly broken and entered. The house had been ransacked

and there appeared to have been a struggle between the victim and his assailants. Buttons from a shirt the victim had been wearing were scattered throughout the living room of the house, and the telephone wire had been cut. The victim's wallet was also found in the house, containing no money.

The defendant, who lived near the victim, and a number of others were questioned by officers in the three weeks after the murder to find if they had any information about the killing.

On September 17, 1981, the defendant called the sheriff from his grandmother's home to say that he wanted to make a statement. The sheriff sent a car for him and he made the statement in question. The sheriff showed him the statement of Clifford Peele that implicated the defendant in the murder.

In the defendant's detailed and lengthy statement given that night, he said that Peele had asked him about a good house to break in; that he had told Peele of Ben Tester's home because Tester had money and went to church and would be away from home. Peele, Eddie Montgomery, Jeff Causby and the defendant went ot Tester's home in a stolen truck, broke in and ransacked the house. Tester, age 73, surprised them by returning before the burglary was complete. Peele threw him to the floor and took his wallet.

By the statement, the defendant said a number of times, "Cliff, let's go," but Peele said that they were going to "string him up." Peele got a rope and Montgomery agreed on the hanging. Because Montgomery threatened to whip him, the defendant tore a sheet; made a gag and put it in Tester's mouth. Montgomery tied the knot in the gag. Peele and Montgomery took Tester out and put him on a truck. Montgomery climbed an apple tree and put a rope over a limb; Peele tied the rope around Tester's neck. At this point Causby ran. Peele and Montgomery eased Tester off the tailgate, leaving him swinging from the tree. Peele, Montgomery and the defendant left in the truck.

Defendant recanted this confession the next day. A suppression hearing was conducted prior to trial in which the court found that the confession by defendant had been freely and voluntarily given. This confession was subsequently admitted into evidence at trial.

Defendant first contends that this statement given by him was rendered invalid by the circumstances surrounding its taking, and in a related argument he claims he was denied the right to counsel during rendition of the statement.

Testimony given at the suppression hearing indicated that the September 17th interrogation of defendant began at 9:27 p.m. and ended at approximately 1:30 a.m. Agents Don Collins and S. A. Sloan of the T.B.I. were present, as were Assistant Attorney General Lynn Brown and Sheriff George Papantoniou. As well, Juvenile Judge Jesse Ray arrived after defendant had given the statement, as it was being read by Agent Collins.

Prior to the interrogation, defendant's father signed a parental interrogation interview waiver that allowed the officers to talk to the juvenile defendant in his presence. He also signed the confession as a witness. Defendant claimed his father left after signing the waiver, although Collins, Brown and Papantoniou stated that defendant's father remained throughout the interrogation. We note that the father, M. B. Street, was not called at this hearing or at trial to support the allegations made by his son.

Defendant also signed a form waiving his *Miranda* rights prior to initiation of the interrogation, as well as signing the completed statement and acknowledging that it was true. He made a number of corrections in the statement before signing.

There is no question that defendant was distraught and cried at times during the interrogation. He also claims that the officers refused to allow his mother to attend the interrogation, although testimony indicated he actually requested that his mother not be there.

Assistant Attorney General Brown stated that he told defendant at least three times he was free to leave during the interrogation; Collins' testimony supported this. Defendant claimed that he asked to go home, but was told he could not until the statement was complete.

Defendant alleged that Sheriff Papantoniou had threatened to send him to jail the next morning if he refused to give a statement concerning the Tester murder. (Defendant had been convicted in juvenile court previously on an unrelated charge and was out on bail pending sentencing.) He said the sheriff also promised to make him a trusty at the county jail if he did confess. The sheriff denied these allegations; these denials were supported by Brown and Collins.

Defendant stated he was promised he could go home after the statement if he did confess and at least temporarily would not be arrested for the murder. The sheriff said he only promised to talk to the judge and Attorney General Brown about this. However, Brown testified that following the statement defendant was allowed to go home and was not arrested for the murder until some four to five days after that. Brown stated this was done because the defendant was already out on bond, there was little risk that he would leave the state, and they feared for his safety. The sheriff also said that he did not want to arrest anyone at that time for fear others would leave the state.

Defendant also claims to have been threatened with the electric chair upon conviction. All the other witnesses, however, stated that he was merely informed of the seriousness of the crime, although "death penalty" or "electric chair" may have been mentioned.

Defendant claimed the sheriff kept interrupting him during the interrogation, telling him he was lying. He said the sheriff at these times kept referring to the confession of Clifford Peele. Although the sheriff denied these allegations, Brown and Collins testified that the sheriff did interrupt, and that copies of the Peele confession were present during the interrogation.

Finally, defendant claims he requested that counsel be present, but was told by the sheriff that a lawyer would do him no good. This charge was denied by Papantoniou, Collins and Brown; Brown, in addition, remembered defendant specifically stating he did not want an attorney present. The defendant had signed a waiver of rights form that included a waiver of the presence of an attorney.

The court found after hearing the evidence that the confession was knowingly, voluntarily and intelligently given, and overruled the motion to suppress.

The voluntariness of a confession is to be determined from the totality of the circumstances surrounding the statement, considering the demeanor and credibility of the witnesses. *State v. Kelly,* 603 S.W.2d 726 (Tenn. 1980). Examining the suppression hearing record in this light, there is material evidence to support the finding of voluntariness by the trial judge. This finding has the weight of a jury verdict, and as such, this court is bound to accept that determination. *State v. Adams,* 631 S.W.2d 392 (Tenn. 1982); *State v. Kelly, supra,* at 729.

This same "totality of the circumstances" approach is used to determine if there has been an effective waiver of counsel. *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). The written waiver of right to counsel, supported by General Brown's testimony that defendant stated he did not want counsel present, are sufficient to support the implicit finding of effective waiver of counsel. These two issues on the admissibility of the confession are without merit.

Defendant next contends that introduction of Clifford Peele's confession implicating him in the homicide without Peele's presence at trial violated defendant's right to confront the witnesses against him.

At trial, defendant relied on an alibi defense. Testifying in his own behalf, he denied the validity of his September 17th confes-

sion, saying that Sheriff Papantoniou read Clifford Peele's confession to him a number of times and told him to "say the same thing similar to this." Defendant claimed that whenever he made a statement differing from Peele's confession the sheriff would tell him he was lying and then would "read Peele's statement back and I'd say yeah that's right."

The state called Sheriff Papantoniou as a witness during rebuttal testimony in an attempt to introduce a written copy of the Peele confession, as well as have him orally recite the confesion to the jury. The state's position was and is that the confession was not introduced to prove the truth of matters asserted therein. Rather, the confession was used to rebut defendant's allegation that his statement was derived from Peele's. This was done by pointing out specific references to the scene of the crime in defendant's statement that were absent in Peele's. Since the confession was being used for this nonhearsay purpose, the state argues that there was no confrontation problem. No attempt was made by the state to call Peele as a witness, nor to redact portions of the Peele confession implicating defendant in the homicide. Peele was in the Unicoi County Jail near the courthouse. The trial judge after some deliberation admitted the confession into evidence over defendant's objection. He cautioned the jury to consider the confession for rebuttal purposes only and reiterated this caution during the jury charge.

We agree with the state that the Peele confession as used at trial was not hearsay within traditional rules of evidence. See Paine, *Tennessee Law of Evidence,* §47 (1974). However, defendant's confrontation rights are not foreclosed merely because the confession as admitted did not constitute hearsay. While hearsay rules and the Confrontation Clause are generally designed to protect similar values, the overlap between the two is not complete. *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Jones,* 598 S.W.2d 209 (Tenn. 1980).

In this case, while admission of the confession was not technically used to prove its truth, the state in actuality placed before the jury testimony incriminating the defendant, made by one not available for cross-examination.

In *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the petitioner's accomplice, Loyd, had previously been convicted. The prosecution called him as a witness at petitioner's trial, where he invoked his privilege against self-incrimination. The prosecution then produced a confession signed by Loyd, and under the guise of refreshing his collection, read aloud this confession implicating the petitioner. Every few sentences he would ask if these statements were true and Loyd would reassert his privilege. Afterwards, law enforcement officers were called to the stand and verified that the document read from was indeed Loyd's confession. This document was never formally offered into evidence. The Supreme Court reversed petitioner's conviction based on a violation of his right to confrontation. They noted that while the prosecutor's reading of the alleged confession was not technically hearsay, it "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true."

Here, the alleged confessor was not even called to the stand. Those statements inculpating the defendant stood basically unchallenged as the state directed inquiry not to those allegations but to the factual statements surrounding the scene of the crime. The implication was left that the confession was a true rendition of events on the night of the homicide. This situation was compounded by introducing into evidence a written copy of the confession without any attempt to remove references directly linking defendant to the homicide.. There can be no doubt that admission of this confession for any purpose constitutes a denial of defendant's fundamental right to cross-examine those witnesses

against him. In Tennessee, cross-examination is not limited to the subject matter dealt with directly, but extends to any matters material to the lawsuit. See *Long v. State,* 607 S.W.2d 482 (Tenn.Cr.App. 1980). Had Peele been present, defendant could have challenged his accusations as well as the authenticity of the confession. He was not given this opportunity.

This court recognizes that the right to confront and cross-examine witnesses against one is not absolute, and may in certain cases bow to other legitimate interests in the criminal trial process. However, whenever this occurs it calls into question the "ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Berger v. California,* 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969); *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

A close examination of the circumstances surrounding admission of this confession into evidence without calling the confessor to the stand reveals no valid state interest that is served. Although Peele was in jail awaiting trial when the confession was introduced, the state made no effort to call him to testify. Nor was an effort made to limit prejudice to the defendant by redacting incriminating portions of the confession. From an examination of the confession, this could have done without detracting from the alleged purpose for which the confession was introduced. One cannot help but conclude that introduction of this unedited confession was merely a transparent attempt to condemn defendant from another source without allowing the veracity of the source or the confession to be tested by cross-examination.

In *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), petitioner Bruton and his co-defendant Evans were convicted after a joint trial. Although neither defendant testified, an oral confession made by Evans implicating Bruton was introduced at trial. The trial court cautioned the jurors that Evans' confession should be disregarded

in determining the guilt or innocence of Bruton. The Supreme Court reversed Bruton's conviction, holding that at a joint trial where neither defendant testifies, admission of one codefendant's confession inculpating the other violates his right to cross-examination secured by the Confrontation Clause. The court determined that this was true notwithstanding the cautioning instructions given by the trial judge.

The state places great reliance on the "Interlocking Confessions Doctrine" set forth in *Parker v. Randolph,* 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). This doctrine is purported to create an exception to the *Bruton* rule. In *Parker* four members of the court held that the introduction of a codefendant's confession at a joint trial where he does not testify will seldom, if ever, violate the Confrontation Clause if the defendant himself has confessed to participation in the crime. A fifth member of the court, creating a majority, reasoned that any *Bruton* error caused by introduction of this interlocking confession was harmless beyond a reasonable doubt. See also *State v. Elliott,* 524 S.W.2d 473 (Tenn. 1975).

We first note that a common thread running through cases involving nontestifying codefendant confessions and resulting confrontation problems is their use at joint trials. In these trials, policy arguments favoring judicial economy and efficiency allow admission against the confessor. However, these same policy arguments favor limiting instructions by the trial judge and redaction if possible, to avoid prejudice to the other defendant. This court can find no case that has allowed introduction of one codefendant's confession at a severed trial against the other defendant without calling that available confessor to testify.

In Tennessee when *jointly* tried codefendants have confessed and their confessions are similar in material aspects, the *Bruton* rule does not apply. *State v. Elliott, supra,* p. 477, 478. The implication is that for the "Interlocking Confessions Doctrine" to apply there must be a *joint* trial. However, assuming that this doctrine were applicable to severed trials, if:

> "(T)he confession of one non-testifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other non-testifying codefendant, so as to expose the latter to an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment, the latter codefendant is entitled to test the veracity of the statements in the confession of his codefendant. A denial to him of his right through the failure of his codefendant to take the stand brings the *Bruton* rule into play." *State v. Elliott, supra,* at 478.

In the present case, Peele's confession made the defendant much more a principal actor in the burglary and hanging than the defendant's September 17th confession did. In his confession the defendant said that he kept telling Peele to leave after they had robbed Tester but that Peele insisted on the hanging; that defendant did not actually participate in the hanging. Peele's confession said that both he and the defendant placed the rope around Tester's neck. Where each confessor endeavors to place responsibility for the homicide on the other defendant, then the confessions do not interlock. *State v. Robinson,* 622 S.W.2d 62 (Tenn.Cr.App. 1980).

Likewise, the trial judge's caution to the jury not to consider Peele's statement as proof of defendant's guilt was ineffective to correct denial of defendant's right of confrontation. This is especially true when the confession directly charges defendant with the murder, describing his role in the killing in great detail. See *Stallard v. State,* 187 Tenn. 418, 215 S.W.2d 807 (1948). In the context of this case, we feel that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury cannot be ignored." *Bruton v. United States, supra,* 391 U.S. at 195, 20 L.Ed.2d, at 485.

Of course, where proof of defendant's guilt is overwhelming and it appears beyond a reasonable doubt that the confrontation violation had no effect on the verdict, we recognize the er-

ror may be considered harmless. *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *State v. Elliott, supra,* at 478; *Alexander v. State,* 562 S.W.2d 207 (Tenn.Cr.App. 1977). After careful study, we are unable to say that this is true in the case before us. Peele's statement not only implicated the defendant, it alone could establish all essential elements of the homicide, had the jury chosen to believe defendant's confessions were in fact involuntary. Defendant is entitled to a new trial free of this constitutional error.

Reversed and remanded.

/s/ Mark A. Walker,
Presiding Judge

CONCUR:

/s/ Joe D. Duncan, Judge

/s/ Jerry Scott, Judge

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
UNICOI CRIMINAL

State of Tennessee,
Appellant,
VS
Harvey J. Street,
Appellee.

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF STATE OF TENNESSEE

Upon consideration of the application for permission to appeal and brief in support thereof of the State of Tennessee, the opinion of the Court of Criminal Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM

RESPONSE REQUESTED - HAB

83.2143

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF TENNESSE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Petition for a Writ of Certiorari
t the Court of Criminal Appeals
of Tennessee at Knoxville

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STUART HAMPTON
Hampton & Hampton
630 Elk Avenue
Elizabethtown, Tennessee 37643
(615) 543-6000

Attorney for Respondent

QUESTION PRESENTED

Whether a defendant's confrontation rights are violated when the unredacted confession of a non-testifying, yet available, accomplice is read to the jury?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of Tennessee at Knoxville

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinions of the Court of Criminal Appeals of Tennessee and the order of the Supreme Court of Tennessee appear in the appendix to the petitioner's brief.

STATEMENT OF THE CASE

The Respondent adopts the Petitioner's recitations of the facts of the case with the following elaborations which render a more complete version.

Although Clifford Peele was in the Unicoi County Jail--located in close proximity to the courthouse--at the time of Mr. Street's trial, the State of Tennessee made no attempt to call Clifford Peele as a witness to impeach Mr. Street's testimony. Moreover, the State made no effort to redact the portions of Peele's confession which implicated Mr. Street.

REASONS FOR DENYING THE WRIT

The Tennesse Court Of Criminal Appeals Correctly Found A Violation Of The Confrontation Clause In The Introduction Of An Available Nontestifying Accomplice's Confession And Correctly Declined To Create A Novel Exception To The Right Of Confrontation.

The State of Tennessee has presented the instant case as a situation requiring application of the "interlocking confession" doctrine purportedly adopted in the case of Parker v. Randolph, 442 U.S. 62 (1979). A review of the facts and the pertinent authority reveals, however, that the case does not fall within the scope of the Parker decision. Rather, it involves a straightforward question regarding confrontation of adverse witnesses.

In the instant case, the respondent,

Harvey Street, and his alleged accomplices were tried separately. When Mr. Street took the witness stand in his own defense, the State felt that it could impeach his testimony with the statements of Clifford Peele, an alleged accomplice. Although Peele was incarcerated nearby in the Unicoi County Jail, the State did not seek to bring him forward as a rebuttal witness. Rather, the State elected to introduce Peele's statements through the testimony of Sheriff Papantoniou.

This scenario presents a classic violation of the right of confrontation. The clause was adopted to prevent the use of ex parte affidavits and depositions in lieu of available witnesses in criminal trials. As noted by the Court in Mattox v. United States, 156 U.S. 237, 242 (1895):

> The primary objective of the constitutional provision in question [the sixth amendment] was to prevent depositions of ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination. . . ."

The clause affords defendants the opportunity to face their accusers, and allows the judge and jury to view the witness' demeanor to aid them in determining the reliability of the testimony. As noted by the Mattox Court:

> the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

This is precisely the situation presented in the instant case. The State chose to

introduce testimony through a third party; thus circumventing personal examination and cross-examination of the statement-maker. The case of Barber v. Page, 390 U.S. 711 (1968), is instructive in this regard. In Barber, the State was allowed to introduce the preliminary hearing testimony of an accomplice who was incarcerated in federal prison. The testimony incriminated the defendant and, predictably, he was convicted of armed robbery. The Court, however, reversed the conviction because the defendant's confrontation rights had been violated. The Court stated:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Id. at 721 (quoting Pointer v. Texas, 380 U.S. 400, 405 (1965)).

Moreover, significant in the Court's decision was the observation that the State made no effort to procure the presence of the absent witness at the defendant's trial. Clearly, the instant situation is controlled by Barber. In both cases, the State circumvented the mandates of the sixth amendment confrontation clause by introducing third party testimony without making any effort to secure the presence of the statement-maker.

The State has sought to avoid the clear confrontation clause issue by characterizing this case as an "interlocking confession" case, governed by the plurality opinion of Parker v. Randolph, supra. This analysis is flawed for several reasons. First, the Parker decision is inapplicable because that

case involved a joint trial where the codefendants made interlocking confessions. Since the codefendants each exercised their constitutional rights not to testify they were "unavailable" to render direct testimony. The State was faced with the situation where it could not put the individual statement-makers on the stand. In the instant case, however, the statement-maker, Peele, was available to render direct testimony.

Second, the Parker case is inapplicable because the per se rule regarding "interlocking confessions" was not adopted by the majority. Four members of the Court embraced the per se rule and four members rejected the per se rule. Justice Rehnquist wrote for the plurality, in which he was joined by Chief Justice Burger and Justices Stewart and

White. Justices Stevens, Brennan, and Marshall rejected the per se rule in dissent. Justice Blackmun also rejected the per se rule, but concurred in the result because he felt that the situation was governed by the doctrine of "harmless error."

Most importantly, however, the Parker decision is of dubious precedence because the plurality found that the right to confront adverse witnesses would prove of little value to a person who allows his own incriminating confession to stand before the jury unchallenged. As observed by Justice Rehnquist:

> Successfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.

Id. at 73 (emphasis added). In the instant case, however, Mr. Street specifically took

the stand to assert an alibi defense and contest the validity of his confession. By challenging his alleged confession in this manner, the right to cross-examine his accuser, Peele, became critical. The crucial issue was the determination of who was speaking the truth: Peele or Street.

Street was before the jury, available for cross-examination and scrutiny of demeanor in order to gauge the veracity of his statements. Peele, on the other hand, was incarcerated in a nearby jail. His statements were presented to the jury through the sheriff. Thus, there was no means by which the jury could effectively gauge the veracity of Peele.

The State has attempted to expand the "interlocking confession" doctrine to those instance where the complaining defendant has

taken the stand and challenged the voluntariness and reliability of his alleged confession. It is submitted that this not only makes Parker inapplicable but also renders confrontation with an accomplice, whose contrary statement is spread before the jury without benefit of cross-examination, crucial.

The State suggests that no error accrued to Street because Peele's statement was used solely to impeach Street's contrary testimony. The State also points out in its version of the Statement of the Facts that the jury was instructed to not consider Peele's statement for the truth of the matter asserted and that "the State's references to Peele's statement during closing arguments were also carefully limited to its impeachment value." (Brief for Petitioner at 5) It

is submitted, however, that the foregoing justification for introduction of Peele's confession in this manner is a mere guise for introducing incriminating testimony from a purported eyewitness without risking cross-examination of that witness. Indeed, as observed by the Tennessee Court of Criminal Appeals:

> A close examination of the circumstances surrounding admission of this confession into evidence without calling the confessor to the stand reveals no valid state interest that is served. Although Peele was in jail awaiting trial when the confession was introduced, the state made no effort to call him to testify. Nor was an effort made to limit prejudice to the defendant by redacting incriminating portions of the confession. From an examination of the confession, this could have done without detracting from the alleged purpose for which the confession was introduced. One cannot help but conclude that introduction of this unedited confession was merely a transparent attempt to condemn defendant from another source without allowing the veracity of the source or the confession to be tested by cross-examination.

Appendix to Brief for Petitioner at 9 (emphasis added).

In the case of Douglas v. Alabama, 380 U.S. 415 (1965), the defendant and his accomplice, Loyd, were tried separately. Loyd was called to testify at the defendant's trial, but he invoked his privilege against self-incrimination when questioned about the incident. The prosecution then, under the pretense of "refreshing" Loyd's memory read Loyd's confession to the jury. Since the confession implicated the defendant, the Court held that reading it to the jury denied the defendant his sixth amendment right of confrontation. Similarly, the introduction of Peele's statement, in the instant case, under the guise of "impeachment" cannot be

justified. In both cases, even though the confession was not technically introduced for the truth of the matter asserted, it nevertheless had the practical effect of direct testimony.

The "mere impeachment" justification for introduction of this damning testimony is further belied by the fact that the State made no effort to redact the portions of Peele's confession which incriminated Mr. Street. As noted by the Tennessee Court of Criminal Appeals, this could have been done so as to minimize the damage to the defendant without detracting from the purported "impeachment" purpose for which the confession was introduced. (Appendix to Brief for Petitioner at 9)

Finally, the State makes the following allegation:

> The lower court's decision is even more disturbing in that it allows a defendant to use the confrontation right to distort the truth-finding function of the criminal trial. Street will now be able to take the stand and make his false claim that he was forced to parrot Peele's confession, confident in the knowledge that the State will be unable to impeach him with the confession itself.

(Brief for Petitioner at 7-8) This impassioned distortion of the probable consequences of recognizing Mr. Street's sixth amendment claim does not withstand even the most cursory scrutiny. For example, application of the confrontation clause <u>enhances</u>, rather than perverts, the truth-finding function of the criminal trial. It allows the finder of fact to gauge the veracity of a criminal defendant's accuser before accepting his statement. This is particularly true where, as in the instant case, the defendant's ver-

sion of the incident and the accuser's version of the incident are contrary.

The assertion that Mr. Street can now take the stand and lie with impunity is patently absurd. First, "his false claim that he was forced to parrot Peele's confession" could easily be rebutted with the testimony of the sheriff who was present, if the State indeed feels that this aspect of Street's testimony was false. Secondly, and perhaps most critically, the State could avoid the entire confrontation problem by bringing forth Peele as a witness. It is understandable that the State preferred to introduce Peele's statements through a sheriff rather than an accused felon. No doubt Sheriff Papantoniou was a better and more credible witness than Peele. Nevertheless, the confrontation clause does not sanction the use of ex parte

depositions in lieu of direct testimony. The clause was adopted specifically to provide criminal defendants the opportunity to address the veracity of their accusers.

At one time, it was felt that guaranteeing the opportunity to face one's accuser and subject him to cross-examination would impede, albeit "distort", the truth-finding function of the courts. The common belief was that "so many horsestealers may escape, if they may not be condemned without witnesses." 2 Howell, A Complete Collection of State Trials 18 (London 1819). The sixth amendment of the confrontation clause, however, was specifically adopted to permit criminal defendants the opportunity to face their accusers. In the interest of securing fundamentally fair trials, it has been uniformly held that the right of confrontation

and cross-examination must be maintained: even though by doing so the State will risk allowing "so many horsestealers" to escape.

CONCLUSION

For the reasons herein stated, the respondent urges this Court to deny the writ of certiorari.

Respectfully submitted,

STUART HAMPTON
Hampton & Hampton
630 Elk Avenue
Elizabethtown, Tennessee 37643
(615) 543-6000

(4)

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals Of Tennessee At Knoxville

BRIEF FOR THE PETITIONER

W. J. MICHAEL CODY
Attorney General of Tennessee
Counsel of Record

ROBERT A. GRUNOW
Associate Chief Deputy
Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

38 pp

QUESTION PRESENTED

Whether the introduction of a nontestifying accomplice's "interlocking" confession, on rebuttal, solely to impeach the defendant's claim that his own confession was a coerced imitation of the accomplice's, violated the defendant's right to confrontation of witnesses against him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions, Statutes and Rules:

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court of
Criminal Appeals Of Tennessee At Knoxville

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee at Knoxville reversing the respondent's conviction (Pet. App. A-1 - A-12) is reported at 674 S.W.2d 741. The order of the Supreme Court of Tennessee at Knoxville denying discretionary review under Tenn. R. App. P. 11 (Pet. App. A-13) is not published, but is noted at 674 S.W.2d 741.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on January 25, 1984. Discretionary review was sought in the Supreme Court of Tennessee, and was denied on April 30, 1984 (Pet. App. A-13). The petition for a writ of certiorari was filed on June 29, 1984, and was granted on October 29, 1984. ____

U.S. ____, 105 S.Ct. 321. Jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ..

STATEMENT OF THE CASE

The victim, 72-year-old Ben Tester, was last seen alive walking toward his house in Hampton, Tennessee, at about 8:45 p.m. on August 26, 1981. (J.A. 9.) His body was found the next day, hanging by a nylon rope from an apple tree in his back yard.

Respondent Harvey J. "Joe" Street, a juvenile at the time of the murder, was transferred to the Criminal Court of Carter County to be tried as an adult. (J.A. 3.) He was indicted jointly with several others (but not including Clifford Peele, who was charged separately), charged in a single count with murder in the first degree, both premeditated and during the commission of a felony.[1] (J.A. 4-5.) Street's case was severed from those of

---

[1] Tenn. Code Ann. § 39-2-202(a):

> Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

Punishment is death or life imprisonment. Tenn. Code Ann. § 39-2-202(b). Effective April 1, 1982, however, a juvenile transferred for trial as an adult cannot receive a sentence of death. Tenn. Code Ann. § 37-1-134(a)(1); 1982 Tenn. Pub. Acts, ch. 637.

the other defendants, and the venue was changed to Unicoi County. (J.A. 4, 6.) A motion to suppress a statement made by Street on September 17, 1981 was denied after a pretrial hearing.[2] (J.A. 7.) On the second day of trial, the trial court ordered that Clifford Peele be transported to and held at the Unicoi County Jail. (J.A. 7-8.)

The State's case in chief at trial rested primarily on Street's confession of September 17, 1981. Agent Don Collins of the Tennessee Bureau of Investigation testified that he took the statement and reduced it to handwriting, correcting it as Street directed. (J.A. 24, 26-28, 50-58, 64-66.) Street had been advised of and had waived his rights, and his father was present throughout the questioning; Street did not want his mother present. (J.A. 22-24, 43-45.) An assistant district attorney present during the questioning told Street three times that he was free to go home any time he wished, and he was permitted to leave after making the statement. During the questioning, he told Agent Collins two or three times to hurry up so he could go home. (J.A. 28-29, 46-48.) The statement was read to the jury, and Agent Collins' handwritten original (with Street's corrections and signature) was introduced into evidence. (J.A. 25-26.)

According to the statement (J.A. 353-360), Street and Clifford Peele planned the burglary of Tester's house, based on Street's information that Tester would be at church that night and had $10,000 in cash in the house. At one point, Peele asked Street if he was "willing to do [his] part" if Tester came in during the burglary, i.e., help to "whip" or "kill" Tester; Street responded that he was not. During the course of the day, and on Peele's instructions, Street recruited Eugene Montgomery and Jeff Causby to assist in the burglary, and gave some money to Tiny Bailey to buy a white nylon rope.

---

[2] Street appealed the admissibility issue to the Tennessee Court of Criminal Appeals, which held that the trial court's findings of a knowing waiver and voluntariness were supported by the record. (Pet. App. A-4 - A-6.) Street did not appeal this issue to the Tennessee Supreme Court.

Between 9:00 and 9:30 p.m., the four young men drove to Tester's unlighted house in a stolen pick-up truck. A window to the right of the front door was open, and the burglars cut the screen completely out with a Double-X knife Street had stolen earlier in the day. The burglars entered the house and began to search it; the telephone wire was cut and a light was turned on. After 10 or 15 minutes, Peele warned that someone was coming, and Tester walked in the front door. Peele wrestled with Tester, who eventually quit struggling. Peele then ripped open Tester's shirt searching for the money. Street claimed that he then ran out to the truck, followed by Peele, whom he urged to flee with him. Peele got the rope out of the truck and said, "No, we're going to string him up." Montgomery came outside and agreed.

The statement further related that they went back into the house, where Street made a gag from a sheet and put it in Tester's mouth (after being threatened by Montgomery). Peele requested that a pillow be brought to smother the victim, but when Montgomery appeared with a pillow Peele said it was not needed. Montgomery emptied Tester's wallet and threw it into the right front bedroom. Montgomery and Peele carried Tester outside and laid him on the tailgate of the truck, which Peele then backed to the tree. Street and Peele got up in the truck while Montgomery climbed into the tree to affix the rope. Peele tied loops in the rope and put them around Tester's neck (at which point Causby fled on foot), and Peele and Montgomery eased Tester off the tailgate. Street kept urging them to get out of there, and they left in the truck. At the close of the statement, Street said that some shirts and a sheet removed from Tester's house were later thrown off a cliff, and that Montgomery had stolen some checks, one of which was cashed.

Street made two other incriminating statements which were described to the jury. On November 23, 1981, while incarcerated at the Carter County Jail, Street told an officer that he needed to see the sheriff, since he knew the location of the

white truck which had the clothes in it that had come from Tester's house. (J.A. 84-86.) On June 27, 1982 Street gave a statement to the sheriff and two other men. Street identified a truck as the one used in the hanging, and admitted that he had placed the second loop of the rope around Tester's neck, having been compelled to do so by his uncle, Kelly Banner. (J.A. 74-76.)

The remainder of the State's proof in chief tended to corroborate Street's primary confession. Agent Collins and the victim's son investigated the scene, finding that the window screen had been cut with a knife and partially torn, a light in the house had been turned on, and the telephone wire had been cut. (J.A. 10-11, 17, 20; R. III, 220.) The house had been ransacked, shirts were missing from a bedroom closet, buttons from the victim's ripped shirt were found on the floor, a small pillow was lying near the entrance to the living room, and the victim's empty wallet was lying on the floor of the right front bedroom. (J.A. 11-12, 15, 18-20.) A torn sheet in the house matched the gag found in the victim's mouth. (J.A. 16, 29.) The victim was hanging by a white nylon rope tied in a double loop, and bits of grass on the limb from which the victim was hanging indicated that someone had climbed into the tree. (J.A. 14-16.)

In cross-examining Agent Collins, defense counsel brought out the fact that Clifford Peele had made a "confession" on September 16, 1981, the day before Street's main confession. (J.A. 30-32, 50.) Defense counsel attempted to introduce Peele's confession into evidence, but the State's hearsay objection was sustained. (J.S. 40-42.) Agent Collins denied that Peele's confession or any other information had been used to suggest to Street the contents of his own confession; in fact, Street included in his confession details which the officers knew were inconsistent with other information they had received. (J.A. 50-58, 64-66.)

The defense proof began with a string of alibi witnesses who attempted to account for Street's whereabouts throughout the

night of the murder. This proof, however, contained several contradictions. For example, two girls testified that they spoke with Street by telephone at a pool hall until 9:30 p.m., but also that at the end of the call they spoke with another youth who testified that he left the pool hall at 8:00 p.m. (J.A. 131-132, 134-138, 141-144.) Few of the witnesses were able to testify to Street's actual whereabouts at the time of the burglary and murder.

Street also testified in his own behalf, recanting his confession and denying any connection to or knowledge of the burglary or murder. Street stated that on several occasions Sheriff Papantoniou had taken Street into custody and questioned him about the murder, although Street could not recall whether he was under arrest at the time of the September 17, 1981 confession. (J.A. 186-188.) On that evening he was alone with the sheriff before the other officers arrived, and the sheriff threatened that he would see that Street received stiff penitentiary sentences on certain juvenile offenses unless Street confessed to the murder. The sheriff also allegedly promised that if Street confessed, he could go home that night and would be made a trustee while serving his sentences in the Carter County Jail. (J.A. 188-190, 192, 196, 228-229.)

Feeling that he had to confess to avoid the penitentiary,[3] Street decided to give a "confession" in which he deliberately falsified or concocted various details. He supposedly reasoned that the officers would investigate these details and, upon finding them to be false, would reject the entire statement as unreliable. (J.A. 194-195, 217-221, 234-235, 240-241.)

---

[3] Despite a long history as a juvenile offender, Street claimed he did not know a juvenile could not be sentenced to the penitentiary without first having been transferred to criminal court to be tried as an adult. (J.A. 222-224.)

Certain details (which the proof showed to be accurate) had, according to Street, been fed to him by the officers, particularly Sheriff Papantoniou. The sheriff had earlier read to Street several times the statement made by Peele the day before, and Street admitted on direct examination that Peele's statement implicated Street. (J.A. 190-191, 221, 224.) Several times during Street's confession the sheriff would read from Peele's statement and insist that Street say something similar. If Street deviated from Peele's account in any particular, the sheriff would halt the proceedings, accuse Street of lying, and insist that Street adopt Peele's or the sheriff's version. (J.A. 194, 202, 203, 217-221, 225-226, 239-250.)

Street also testified that the circumstances of the confession were generally oppressive. His father had left immediately after signing the interrogation form, and the officers refused Street's requests for the presence of his mother or an attorney. (J.A. 192-193, 205-206, 226-227.) Street simply denied making either of the other two incriminatory statements. (J.A. 196-200, 203-204, 235-239.)

The State presented rebuttal proof including three witnesses whose observations on the night of the murder tended to impeach Street's alibi defense. (J.A. 253-265.) A police officer testified about a statement begun by Street two days after the murder, but cut off on the request of Street's attorney. (J.A. 208-213, 265-268.)

Also in rebuttal the State called Sheriff George Papantoniou, who began by testifying about his conduct at the times of Street's various statements. The sheriff specifically denied leading or suggesting facts to Street during the September 17, 1981 confession, and denied Street's other allegations about the taking of the statement. (J.A. 271-277, 288-291, 305-310, 311-314.)

An evening recess was taken, and on the following morning the State moved for introduction into evidence of Peele's September 16, 1981 confession. The State argued that the con-

fession was not being offered for the truth of the matters stated therein, but instead to impeach Street's account of his own confession by showing that Street had confessed to details which were not contained in Peele's confession. After extended argument, the trial court allowed Peele's confession into evidence. (J.A. 281-288, 292-295.)

Before the confession was read into evidence, the trial judge twice instructed the jurors as follows:

> Objection is overruled, but ladies and gentlemen of the jury, I want to explain that the Court is - - is allowing the introduction of Mr. Peele's statement not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only as to other proof that might have been offered.

(J.A. 292, 293.) The statement was then read into evidence by the sheriff (J.A. 295-303), and it was introduced both in handwritten and typewritten forms (J.A. 290-291; R. XVIII, Ex. 42).

Peele's account of the burglary and murder was generally similar to Street's, but, as the State emphasized, there were several direct contradictions between the statements, and Street's statement contained several details absent from Peele's. For example, Peele said that a Triple-X knife had been used to partially cut the window screen, while Street had described a Double-X knife that had been used to completely cut out a portion of the screen. (J.A. 300, 357.) Peele's statement said nothing about any lights being turned on, the telephone wire being cut, the victim's shirt being ripped open, the victim's wallet being emptied and thrown into the right front bedroom, shirts stolen from the house, or the fact that the rope was made of white nylon. (J.A. 300-302, 303-304.) With respect to the hanging itself, Peele's confession stated that all four burglars had carried Tester outside, and that Montgomery and Causby stayed in the tree while Street and Peele together put the loops around Tester's neck and lifted Tester off the tailgate. (J.A. 302.)

Finally, the State presented another T.B.I. agent who was present during portions of Street's September 17, 1981 statement, and who also testified contrary to Street's version of how the statement was obtained. (J.A. 324-334.)

In closing argument, counsel for the State referred to Peele's confession only to argue that it impeached Street's claim that he had been coerced to imitate it. (J.A. 334-336, 340-344.) During the final instructions, the trial judge again cautioned the jurors that Peele's statement "can be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." (J.A. 350.) The jury found Street guilty of murder in the first degree, without specifying premeditated or felony murder, and sentenced Street to life imprisonment, the only possible punishment for the offense. (J.A. 8.)

After first finding that Street's September 17, 1981 confession was properly admitted into evidence, the Tennessee Court of Criminal Appeals reversed the conviction, finding constitutional error in the introduction of Peele's confession. (Pet. App. A-1 - A-12.) The court agreed that the confession was not hearsay, but found that the trial court's limiting instructions were "ineffective to correct denial of defendant's right to confrontation" of Peele. In response to the State's argument that the two confessions "interlocked," the court indicated doubt as to whether the "Interlocking Confessions Doctrine" applied to severed trials, and in any event held that the confessions did not "interlock" since Peele's confession made Street "much more a principal actor in the burglary and hanging" than had Street's own confession. Finally, the court refused to find harmless error.

SUMMARY OF ARGUMENT

In *Bruton v. United States,* 391 U.S. 123 (1968), this Court held that a codefendant's confession incriminating a nonconfessing defendant cannot be introduced into evidence at a joint trial without violating the defendant's right to confrontation. Even though the damaging confession had not been technically introduced against the defendant, and the jury had been instructed to consider it only against the codefendant, the Court found that the jury could not be presumed to have ignored the confession in determining the defendant's guilt or innocence.

The Court had faced a similar situation in *Douglas v. Alabama,* 380 U.S. 415 (1965), in which the highly incriminating statement of the previously-convicted accomplice was read to the jury in the guise of cross-examination of the accomplice, who had refused to testify. Even though the statement was technically not in evidence, the Court found the danger of consideration of the confession by the jury to be too great to permit such a procedure without cross-examination of the declarant.

Bruton and *Douglas* do not establish a rigid rule under the Confrontation Clause which bars introduction of a codefendant's confession. Instead, the cases should be read to hold only that, under the factual circumstances presented, a jury is unable to ignore the codefendant's implication of the defendant. Those factual circumstances included a codefendant's confession wholly inadmissible against the defendant for any evidentiary reason; a defendant who had not confessed and did not testify at trial, maintaining innocence throughout the proceedings; and a codefendant's confession which was "devastating" to the defendant's case and added "critical weight" to the prosecution.

The instant case presents very different factual circumstances from either *Bruton* or *Douglas,* and the holdings of those cases simply do not apply here.

First, the accomplice's confession in the instant case was admissible against the respondent as a matter of state law, because it was relevant and was not hearsay, as it was not admitted to prove the truth of the matters asserted therein. Thus it was far easier for the jury to limit its consideration of the confession as instructed by the trial judge than for the juries in *Bruton* and *Douglas* to completely ignore the confessions spread before them. Furthermore, because the wording and contents of the accomplice's confession, and not its truth, had become the relevant inquiry, there would have been no utility in cross-examining the accomplice himself.

Second, the respondent "opened the door" to introduction of the accomplice's confession by testifying that he had been forced to imitate it when he made his own statement. By doing so, the respondent seriously challenged the truth-finding function of the trial, and the State's interest in presenting contrary evidence increased in relation to the danger that the jury would wrongfully consider the accomplice's confession for its truth.

Third, the accomplice's confession "interlocked" with the respondent's own admissions in such a manner that the accomplice's confession was no longer "devastating" to the respondent's case. The respondent had given statements to the authorities admitting that he had willingly planned and participated in the burglary of the victim's house. He had also admitted that he gagged the victim, accompanied the other burglars as the victim was carried out to a pick-up truck, and got up in the truck and assisted by placing at least one loop of rope over the victim's head. These admissions certainly established the respondent's guilt of felony murder, aiding and abetting premeditated murder, or being a principal to premeditated murder, all of which constitute first-degree murder in Tennessee, with life imprisonment the only possible punishment.

ARGUMENT

THE INTRODUCTION OF THE ACCOMPLICE'S CONFESSION, TO IMPEACH AND REBUT THE RESPONDENT'S TESTIMONY THAT HE HAD BEEN FORCED TO IMITATE IT, DID NOT VIOLATE THE RESPONDENT'S RIGHT TO CONFRONTATION.

In *Bruton v. United States,* 391 U.S. 123 (1968), Bruton and codefendant Evans were jointly tried on a charge of armed postal robbery. The government's case in chief included evidence of Evans' oral confession to the crime, which implicated Bruton. Because the confession was hearsay and therefore inadmissible as to Bruton, the jury was instructed to consider it only against Evans. Neither defendant testified, and both were convicted. The Court of Appeals for the Eighth Circuit affirmed Bruton's conviction, relying on the holding of *Delli Paoli v. United States,* 352 U.S. 232 (1957), that jurors could be presumed to have followed the limiting instruction in such cases.

This Court reversed Bruton's conviction, overruling *Delli Paoli,* in an opinion grounded not on an interpretation of the Confrontation Clause, but rather on an analysis of the jurors' ability to follow the limiting instruction.[4] Relying on the more recent decision in *Jackson v. Denno,* 378 U.S. 368 (1964), the Court held that a jury cannot be relied upon to ignore a confession of guilt, even if the confession is made by a codefendant. 391 U.S. at 128-131. The Court conceded that there are "many circumstances" in which reliance on the jury's ability to follow a limiting instruction is justified, but held that in the factual context of Bruton's trial, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135.

[4] "If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor." 391 U.S. at 126.

In reviewing that factual context, the Court stressed that Evans' confession was "powerfully incriminating" in a manner "devastating" to Bruton, and that any accomplice's attempt to shift blame to others renders his or her statements intolerably unreliable in the absence of testing by cross-examination. 391 U.S. at 135-136.[5] Subsequent cases suggesting that violations of *Bruton* may be harmless also stressed the weight of the codefendant's statements in relation to the weight of independent evidence of the defendant's guilt. *See Harrington v. California,* 395 U.S. 250 (1969); *Schneble v. Florida,* 405 U.S. 427 (1972).

Three years prior to *Bruton* the Court had faced a similar problem in *Douglas v. Alabama,* 380 U.S. 415 (1965), in which codefendant Loyd's highly incriminatory confession was read aloud in the form of cross-examination of Loyd, who had already been found guilty in a separate trial but was refusing to answer questions at Douglas' trial. Loyd's confession was not admitted into evidence, and apparently no limiting instructions were given to the jury. Foreshadowing *Bruton,* the Court noted

[5] Justice Stewart restated the majority's holding:

> [T]he underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.

391 U.S. at 137-138 (Stewart, J. concurring).

that Loyd's statements were "of crucial importance" in that they named Douglas as the person who fired the gunshot which wounded the victim, 380 U.S. at 417, and that Loyd's refusal to answer "added critical weight to the prosecution's case in a form not subject to cross-examination," 380 U.S. at 420, quoting from *Namet v. United States,* 373 U.S. 179, 187 (1963).

The *Douglas* Court was also concerned about the jurors' ability to ignore Loyd's confession, even though it had not been placed in evidence. The reading of the statement and Loyd's refusals to answer "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement;" and Loyd's use of the privilege against self-incrimination "created a situation in which the jury might improperly infer both that the statement had been made and that it was true." 380 U.S. at 419. Testimony of law enforcement officers at trial "enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession." 380 U.S. at 420.

A careful reading of *Bruton* and *Douglas* belies the conclusion that either case established a rigid rule barring the introduction of a codefendant's confession which implicates the defendant. Instead, *Bruton* and *Douglas* should be read to establish only that, under the factual circumstances presented, a jury is unable to follow instructions that a confession not in evidence against a defendant is not to be considered as to that defendant.[6] The factual circumstances of *Bruton* and *Douglas*

---

[6] In other words, as noted by the plurality opinion in *Parker v. Randolph,* 442 U.S. 62, 75 n. 7 (1979), *Bruton* is more accurately viewed not as setting out a rule concerning confrontation, but as establishing an *exception* to the long-established presumption that jurors hear and obey limiting instructions. *See Opper v. United States,* 348 U.S. 84, 95 (1954); *Blumenthal v. United States,* 332 U.S. 539, 552-553 (1948). This important presumption was recently reaffirmed in *Marshall v. Lonberger,* 459 U.S. 422, 438 n. 6 (1983).

included a defendant who had not confessed and did not testify at trial, maintaining innocence throughout the proceedings; and the introduction or use of a codefendant's confession wholly inadmissible against the defendant for any evidentiary reason, and which was "devastating" to the defendant or added "critical weight" to the prosecution.

Each case, however, presents a different set of circumstances that requires a reweighing of the principles set forth in *Bruton.* The instant case presents such distinct factual differences from *Bruton* and *Douglas* that it cannot be said to fall within the scope of their holdings. In other words, in this case there clearly was no "*Bruton* violation."[7] The primary factual differences between *Bruton* and *Douglas* and the instant case are: a) Clifford Peele's confession was admissible against respondent Street as a matter of state evidentiary law, and the jury was not required to completely ignore it; b) the respondent "opened the door" by bringing into issue the terms of Peele's confession; and c) Peele's confession "interlocked" with the respondent's confession, added no material weight to the State's case, and was hardly "devastating."

---

[7] As the opinions in *Parker v. Randolph, supra,* make clear, the difference between a "nonviolation of *Bruton*" and a "harmless violation of *Bruton*" may be no more than a semantical tempest in a teapot. The plurality in *Parker v. Randolph* noted that while the Court has said that a *Bruton* violation may be found harmless, it has never actually done so. 442 U.S. at 71 n. 5.

If *Bruton* is limited to its factual context, which the opinion does by its own terms, then a true "violation" of *Bruton* might never be "harmless." If, on the other hand, *Bruton* established a broad constitutional rule of evidence to which there are innumerable exceptions, then the appropriate approach to each case is to make a harmless error determination. *Cf. Parker v. Randolph,* 442 U.S. at 77-82 (Blackmun, J. concurring).

A. Peele's Confession Was Admissible Against the Respondent as a Matter of State Evidentiary Law, and Was Properly Before the Jury for its Consideration.

In both *Bruton* and *Douglas,* the highly damaging confessions of the codefendants were placed before the jury, but the jurors were expected to wholly ignore the confessions when considering the guilt or innocence of the defendants. This is a particularly difficult mental exercise.

> "In joint trials, . . . when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' "

Bruton, 391 U.S. at 131, quoting with approval *People v. Aranda,* 63 Cal.2d 518, 529, 47 Cal. Rptr. 353, 359-360, 407 P.2d 265, 271-272 (1965).

The jurors in the instant case, however, were not faced with that overwhelming task. Peele's confession became relevant when Street claimed that he had been forced to imitate it, and its admission did not violate the rule against hearsay because it was not admitted to prove the truth of the matters asserted therein.[9] The jury was therefore not required to ignore the accomplice's confession, but simply to consider it for a limited purpose, impeachment and rebuttal of the respondent's claims.

Jurors are routinely and frequently called upon to consider evidence for a limited purpose. For example, when the defendant in a criminal case places his or her character in issue,

---

[9] The Tennessee Court of Criminal Appeals so held as a matter of state evidentiary law. (Pet. App. A-7.) *Cf.* Fed. R. Evid. 801(c).

evidence of prior criminal activity is relevant only to character and not to guilt or innocence, and it is an important premise of the jury system that jurors will so limit their consideration of the evidence. *Spencer v. Texas,* 385 U.S. 554, 562 (1967); *Michelson v. United States,* 335 U.S. 469, 484-485 (1948). In both *Harris v. New York,* 401 U.S. 222, 223 (1971), and *Oregon v. Hass,* 420 U.S. 714, 717 (1975), the juries were instructed and apparently entrusted to consider otherwise inadmissible incriminatory statements by the defendants only as the statements bore on their credibility as witnesses, and not as proof of guilt or innocence. To hold, therefore, that the jury in the instant case cannot be presumed to have properly limited its consideration of Peele's confession would have a much broader and more damaging impact on the jury system than *Bruton's* rejection of the presumption on the limited facts of that case.

Furthermore, the legal admissibility of Peele's confession demonstrates clearly why there is no true "confrontation" problem in this case. Because the wording and contents of the confession, and not its truth, had become the relevant inquiry, there would have been no utility in cross-examining Peele on the confession's reliability. Even if the confession had been shown to be completely false or involuntarily made, its relevance and evidentiary weight would have been just as strong on the issue of whether Street was forced to imitate it at the time of his own statement. A similar distinction was made in *Dutton v. Evans,* 400 U.S. 74, 88 (1970):

> [The defendant] was not deprived of any right of confrontation on the issue of whether [his coconspirator] actually made the statement related by [witness] Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confronta-

tion Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard. [Footnote omitted.]

B. The Respondent "Opened the Door" to Introduction of Peele's Confession by Bringing Into Issue the Terms of the Confession.

Unlike the defendants in *Bruton* and *Douglas,* the respondent in the instant case chose to testify and recant his September 17, 1981 confession. His unique claim was that he had been coerced by the sheriff to imitate portions of the confession given by Clifford Peele on the previous day,[9] which explained how he had been able to so accurately describe the burglary and murder without having been there.

With this theory of defense, the respondent affirmatively brought into issue the terms of Peele's confession. Only by reviewing Peele's confession itself could the jurors evaluate the credibility of Street's claim. Since it was the terms of the confession, and not its truthfulness or reliability, which was brought into issue, Peele's testimony would have been irrelevant, and cross-examination of Peele would have shed no light on the issue raised by the respondent.

By defending himself in this manner, the respondent significantly shifted the balance of interests involved, and in fact threatened the reliability of the result of the trial. Until Street took the stand, the State's interest in presenting Peele's confession for any purpose would have been far outweighed by the "substantial threat," recognized in *Bruton,* that the jury would consider the confession for its truthfulness without the

---

[9] This claim pertained to certain portions of his confession. Street testified that he had also deliberately misstated various facts and had simply concocted some portions of the confession.

benefit of testing by cross-examination. When Street made his coerced-imitation claim, which could be credibly disproved only by reviewing Peele's confession, the State's interest in presenting that contrary evidence greatly increased.

"We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass,* 420 U.S. 714, 722 (1975). The ultimate goal of the Confrontation Clause itself is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials...." *Dutton v. Evans,* 400 U.S. 74, 89 (1970); *California v. Green,* 399 U.S. 149, 161 (1970). Therefore when a defendant "affirmatively resorts to [false] testimony in reliance on the [prosecution's] disability to challenge his credibility," *Walder v. United States,* 347 U.S. 62, 65 (1954), "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope [of the constitutional right involved]." *Brown v. United States,* 356 U.S. 148, 156 (1958); *Jenkins v. Anderson,* 447 U.S. 231, 236-238 (1980).

Based on this balancing of interests, the Court in several other cases has held that *Miranda*-violated[10] statements and prearrest silence may be used by the prosecution on cross-examination to impeach a defendant who has testified contrary to those statements or to the inference of guilt that may be drawn from that silence. *Harris v. New York,* 401 U.S. 222 (1971); *Oregon v. Hass,* 420 U.S. 714 (1975); *Jenkins v. Anderson, supra.* The petitioner does not argue here for a broad rule that the defendant who testifies always "waives" confrontation of codefendants who have made incriminatory statements,[11] or that the

---

[10] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[11] Again, the petitioner notes that confrontation of Peele was irrelevant in this case, since it was the contents of Peele's confession, and not his assertions of fact, which were at issue.

prosecution should be permitted to "impeach" a testifying defendant in every case with a codefendant's confession. However, "[t]he shield provided by [the decisions of this Court] cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with" evidence of the true facts. *Harris,* 401 U.S. at 226.

C. The Respondent's Alibi Defense Had Already Been "Devastated" by His Own Confessions and Statements, and Introduction of Peele's "Interlocking" Confession Was Not So Damaging as to Invoke *Bruton*.

A four-Justice plurality[12] of this Court opined in *Parker v. Randolph,* 442 U.S. 62 (1979), that *Bruton* can fairly be limited to the situation in which it arose, and that when the defendant's own confession is before the jury and "interlocks" with the co-defendant's confession, "the constitutional scales tip the other way." 442 U.S. at 74-75 & n. 7. Justice Blackmun concurred in the result, but chose to hold only that if *Bruton* had been violated the violation was harmless error. 442 U.S. at 77-82. Three Justices dissented, 442 U.S. at 81, and Justice Powell did not participate, 442 U.S. at 77. Therefore the Court was unable to resolve the split among the Courts of Appeals on the issue of "interlocking" confessions. 442 U.S. at 68 & n. 4.

Resolution of the *Parker v. Randolph* split is not necessary to a finding that *Bruton* was not violated in the instant case; this case presents facts which remove it even further from *Bruton* than the straight "interlocking" confession situation presented in *Parker v. Randolph*. But the instant case could also serve to clarify *Parker v. Randolph,* since the respondent here had confessed and Peele's confession "interlocked" in such a way that it was no longer "devastating" to the respondent's defense and did not add "critical weight" to the State's case.

---

[12] Justice Rehnquist was joined by Chief Justice Burger, Justice Stewart, and Justice White.

The United States Court of Appeals for the Second Circuit was among the earliest courts to recognize that "interlocking" confessions do not fall within *Bruton*. That court recently summarized the doctrine in *Tamilio v. Fogg,* 713 F.2d 18, 20-21 (2d Cir. 1983), *cert. denied* ____ U.S. ____, 104 S.Ct. 706 (1984).

> This doctrine does not require identity in statements. *United States ex rel. Ortiz v. Fritz,* 476 F.2d 37, 39 (2d Cir.), *cert. denied,* 414 U.S. 1075 . . . (1973). It is sufficient if the confessions are "substantially the same and consistent on the major elements of the crime involved." *United States ex rel. Stanbridge v. Zelker,* 514 F.2d 45, 49 (2d Cir.), *cert. denied,* 423 U.S. 872 . . . (1975). Essentially, to be interlocking, the statements must describe the same crime. *United States v. Fleming,* 594 F.2d 598, 604 (7th Cir.), *cert. denied,* 442 U.S. 931 . . . (1979). The fact that a defendant takes the stand and denies his guilt, thus implicitly repudiating his inculpatory admissions, does not preclude application of the doctrine. *United States ex rel. Dukes v. Wallack,* 414 F.2d 246, 247 (2d Cir. 1969). . . .

The court in *Tamilio* further noted that in a felony-murder situation, a lack of "interlock" on the issue of who actually did the killing is irrelevant, since proof of a defendant's participation in the underlying felony is sufficient to establish his or her guilt. 713 F.2d at 21.

Street's September 17, 1981 confession included admissions that he had helped to plan the burglary of the victim's house (J.A. 353-354), that he knew of the possibility that the victim would be killed (J.A. 354), that he enlisted accomplices (J.A. 355), and that he arranged for the purchase of a rope to be used in connection with the crime (J.A. 356). The confession detailed Street's willing involvement in the burglary, and described how Street had fashioned and tied onto the victim a cloth gag. (J.A. 357-358.) Finally, Street admitted in the confession that he accompanied the other burglars to the tree, and was up in the truck while the hanging took place. (J.A. 358.) Street's June

27, 1982 confession added that Street had placed the rope, or at least the second loop, around the victim's neck. (J.A. 75, 281, 305.)

Peele's confession added nothing of substance to the respondent's own admissions.[13] Peele also related that he and Street had conceived of and planned the burglary, and that Street enlisted help and bought the rope. (J.A. 295-298.) Peele's confession described Street's participation in the burglary and his gagging of the victim, adding only that Street had briefly participated in the initial ambush of the victim before running out of the house. (J.A. 300-301.) Peele's confession also described Street's participation in the hanging, including the fact that Peele *and* Street placed the loops of rope around the victim's neck. Peele added only minor details such as Street helping to carry the victim from the house to the truck and Street helping to lift the victim off the tailgate. (J.A. 302.)

Even if the jury based its verdict on premeditated rather than felony murder, therefore, Peele's confession "interlocked" with Street's statements in a manner precluding any substantial prejudice to Street's defense. Nothing could have been more damning than Street's admissions that he was in the truck and placed at least one loop of rope over the victim's head.

---

[13] Street had already told the jury that Peele's confession "implicated" Street in the burglary and murder. (J.A. 190.)

CONCLUSION

The judgment of the Court of Criminal Appeals of Tennessee should be reversed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General of Tennessee

ROBERT A. GRUNOW
Associate Chief Deputy Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-7087

Attorneys for Petitioner

(3)

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court of
Criminal Appeals Of Tennessee At Knoxville

JOINT APPENDIX

W. J. MICHAEL CODY
Attorney General of Tennessee
Counsel of Record

ROBERT A. GRUNOW
Associate Chief Deputy
Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

Counsel for Petitioner

STUART HAMPTON
HAMPTON & HAMPTON
630 Elk Avenue
Elizabethton, TN 37643
(615) 543-6000

Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED JUNE 29, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

365 PP

TABLE OF CONTENTS

Pleadings and Minute Entries

State's Trial Proof

Defendant's Trial Proof

State's Rebuttal Proof

RELEVANT DOCKET ENTRIES

Date	Proceedings
2-16-82	Order accepting criminal court jurisdiction over juvenile defendants, including respondent.
2-19-82	Respondent and other juvenile defendants arraigned on original indictment; order granting motion to sever respondent's trial.
2-22-82	Corrected indictment jointly charging respondent and five others.
4-13-82	Respondent and others re-arraigned; venue of respondent's trial changed to Unicoi County. Motion to suppress confession of 9-17-81.
7-2-82	Hearing on respondent's motion to suppress confession of 9-17-81; order denying motion to suppress.
7-19-82	Trial begins; motion to prevent request for death penalty granted.
7-20-82	Order that Clifford Peele be transported to Unicoi County Jail.
7-26-82	Jury verdict finding respondent guilty of murder in the first degree, setting punishment at life imprisonment.
8-26-82, 11-12-82	Motion for new trial and amendment thereto.
11-12-82	Order overruling motion for new trial.
7-7-83	Order granting delayed appeal.
1-25-84	Opinion and order of Tennessee Court of Criminal Appeals reversing conviction and remanding for new trial.

2-23-84 State's application for permission to appeal to Tennessee Supreme Court, Tenn. R. App. P. 11.

4-30-84 Order of Tennessee Supreme Court denying permission to appeal.

IN THE CRIMINAL COURT OF CARTER COUNTY
ELIZABETHTON, TENNESSEE

CASE NO. 8085

State of Tennessee

vs.

Harvey James Street
Eugene Montgomery
Jeffery Causby

COURT'S FINDING OF FACT

AND

ORDER

Based upon the testimony and the Court's observation of the defendants, the Court hereby finds that there are reasonable grounds to believe that:

(1) the defendants committed the act as alleged,

(2) the defendants are not committable to an institution for the mentally retarded or mentally ill, and

(3) the interests of the community require that the defendants be put under legal restraint or discipline.

ENTER THIS THE 16th DAY OF FEBRUARY 1982.

/s/ Arden L. Hill
Judge

[Caption Omitted]

MINUTES, CRIMINAL COURT, CARTER COUNTY, FEBRUARY 19, 1982

The defendants, Street, Montgomery and Causby were given a copy of the indictment and waived formal reading of the same and plead not guilty. The motion by the State to sever Defendant Street from the other defendants for trial is granted by the court. Any motion filed as to these three defendants Street, Montgomery and Causby filed by April 5, 1982 will be heard at that day. Motion by the defendants for reduction of bond from One Hundred Fifty Thousand ($150,000.00) Dollars to Fifty Thousand ($50,000.00) Dollars is denied by the Court.

[Indictment Filed February 22, 1982]

TRUE BILL

State of Tennessee, County of Carter

Criminal Court

February Term, 1982

The Grand Jurors of the State of Tennessee, duly summoned, elected, empaneled, sworn, and charged to inquire in and for the body of the County aforesaid, in the state aforesaid, upon their oath, present that HARVEY G. STREET, EUGENE MONTGOMERY, JEFFREY CAUSBY, LARRY DALE BOBBITT, GLENIDA PEELE, TOMMY DALE TAYLOR heretofore, to wit, on or about the 26th day of August A.D., 1981, did unlawfully, feloniously, willfully, deliberately, maliciously, premeditatedly and of malice aforethought assault Ben W. Tester and did then and there unlawfully, feloniously, willfully, deliberately, maliciously, premeditatedly and of malice aforethought kill and murder the said Ben W. Tester in the first degree while the said HARVEY G. STREET,

EUGENE MONTGOMERY, JEFFERY CAUSBY, LARRY DALE BOBBITT, GLENIDA PEELE and TOMMY DALE TAYLOR were perpetrating a burglary in the first degre of the residence of Ben W. Tester against the peace and dignity of the State of Tennessee.

/s/ Lewis W. May
Attorney-General

_____
Assistant Attorney-General

IN THE CRIMINAL COURT FOR CARTER COUNTY,
ELIZABETHTON, TENNESSEE

[Caption Omitted]

ORDER

In this cause an indictment haveing come out of the Grand Jury on February 22, 1982 to correct a prior deficient indictment in case number 8085 because the words, "against the peace and dignity of the State of Tennessee," was left off of said indictment. In the indictment number 8100 INQ additional defendants were also added. It is now ORDERED by this court that all papers filed in 8085 be incorporated as and made a part of the records in this cause 8100 INQ.

Enter this the 13th day of April, 1982.

/s/ Arden L. Hill
Criminal Court Judge

MINUTES, CRIMINAL COURT, CARTER COUNTY, APRIL 13, 1982

State of Tennessee

vs.

Harvey G. Street, Eugene Montgomery,
Jeffrey Causby, Larry Dale Bobbitt,
Tommy Dale Taylor

Murder First Degree
Indictment No. 8100 INQ.
Reset

The defendants appearing in open court acknowledged receipt of the indictment against them, waived formal reading of the same and plead not guilty. Any other motions are to be heard on 6-18-82, trial set 8-23-82.

State of Tennessee

vs.

Harvey G. Street

Murder First Degree
Indictment No. 8100INQ
Motion

It is ORDERED by this court that the motion for a change of venue is agreed to by the State and approved to by the court. Venue changed to Unicoi County and set for 7-19-82. Motions to suppress is set for 6-18-82.

IN THE CRIMINAL COURT FOR CARTER COUNTY
AT ELIZABETHTON, TENNESSEE

[Caption Omitted]

ORDER

In this cause this court Ordered a change of venue as to Harvey G. Street to Unicoi County.

It is ORDERED by this court that the Clerk of this Court hold up on preparing the record to be transferred to the Unicoi County Criminal Court pending further motions in this cause which is presently set for June 18, 1982.

Enter this the 17th day of May, 1982.

/s/ Arden L. Hill
Criminal Court Judge

IN THE CRIMINAL COURT OF CARTER COUNTY
AT ELIZABETHTON, TENNESSEE

[Caption Omitted]

COURT'S FINDING

THE COURT finds that the confession of Harvey Joe Street was knowingly, voluntarily and intelligently given, THEREFORE the motion to suppress the confession is HEREBY DENIED.

ENTER THIS THE 2nd DAY OF July, 1982.

/s/ Arden L. Hill
Judge

[Minutes of July 19, 1982]

[Caption Omitted]

Motion for continuance by defense counsel denied. Motion by defense asking that the State not ask for the death penalty because of new law that went into effect as of April 1, 1982 was granted. Selection of jury began. Jury sequestered for the night.

IN THE CRIMINAL COURT FOR UNICOI COUNTY,
TENNESSEE IN ERWIN

[Caption Omitted]

ORDER

IT IS HEREBY ORDERED THAT THE CARTER COUNTY SHERIFF TRANSPORT CLIFFORD PEEL FROM THE CARTER COUNTY JAIL TO THE UNICOI COUNTY JAIL.

IT IS FURTHER ORDERED THAT THE UNICOI COUNTY SHERIFF HOUSE CLIFFORD PEEL IN THE UNICOI COUNTY JAIL, PENDING FURTHER ORDERS OF THIS COURT.

ENTERED THIS THE 20 DAY OF JULY, 1982

/s/ Arden L. Hill, Judge

[Minutes of July 21-26, 1982]

[Caption Omitted]

The Jury Panel, after hearing the evidence, argument of counsel, and the charge of the Honorable Court retired to consider of their verdict. After due deliberation, the jury returned in open court and on their oath, they find the defnedant [sic]

guilty to Murder First Degree. They set the punishment at life imprisonment. The Court sentenced the defendant to life imprisonment and rendered the defendant infamous. Defendant to be transferred to the Carter County Jail.

TESTIMONY OF BETTY TESTER

Direct Examination

By General Crockett:

[159] *** Q. Can you place the—the time of day when Mr. Tester returned?

A. From church?

Q. Yes, ma'am.

A. Ah, twenty (20) after 8:00, somewhere thereabouts.

* * *

[163] *** All right, when he came there at 8:20, he brought you a newspaper?

A. Yes, sir.

Q. And did you have any conversation with him that evening?

A. I just asked him to stay for awhile, you know. I seen no way, you know, why he should hurry home. So we just asked him to stay and. . .

* * *

[167] *** Q. Over—how long did Mr. Tester stay there at your home when you say he came and you had a conversation; he brought you the paper, the children came in.

A. Say fifteen (15) minutes.

Q. All right. Did—what did he then do?

A. He just went back home.

Q. All right, did—by way of the back of the house again?

A. Yes. Back—I saw him leave our house, he went across our back yard, across his back yard, onto the porch, that's the last I saw of Mr. Tester.

* * *

TESIMONY OF RICHARD TESTER

Direct Examination

By General Brown:

[194] *** Q. After the body had been removed from—from the apple tree, did you go into your father's house with certain Officers?

A. Yes, sir.

Q. And, who did you go with?

A. Went with Greer of the Carter County Sheriff's Department and Don Collins of the T.B.I.

Q. And, why were you going into the house?

A. They wanted to see what was missing out of the house and some articles if they was his.

Q. Were you able to find, if anything, was missing?

A. Yes, sir, the only thing we found was shirts, short **[195]** sleeved shirts and shoes.

Q. Let me show you what has been marked as exhibit 15 in this case, what—what is that a picture of?

A. It's the middle bedroom or the last bedroom. And it's the closet and the bed and the dresser there. And it's got a picture of empty coat hangers where the shirts was hanging.

Q. Would you—would you show to the jury where any property was missing in that picture?

A. The empty coat hangers shows that the shirts was hanging on the hangers.

Q. And does this picture show the situation in that bedroom and closet the way it was when—when you walked in after the body was found?

A. Yes, sir.

Q. Which bedroom is this?

A. We call it the middle bedroom or the second one. There's one in front of this. This is the middle bedroom off from the bathroom.

Q. We offer this as an exhibit. It's already marked. (Exhibit 15 marked and filed.)

Q. And also this picture, what appears to be another closet marked exhibit 16.

A. Okay, now, this is in the dining room area. And **[196]** this is the back part of the house. You go through the kitchen and the dining room is there and it also shows that the shirts is missing out of this closet too. The empty hangers. All the pants was still hanging in all the closets, but the shirts was missing.

Q. Does this show that closet as you found it when you walked into his house that afternoon?

A. Yes, sir.

Q. We offer this now as an exhibit. (Exhibit 16 marked and filed.)

Q. What is shown in this picture?

A. This is in the front bedroom as you come in the front door. The front bedroom, as soon as you come in, there's a door to the right. And this is where his watch or billfold was laying when we went in the house.

Q. And, is his wallet shown in the picture there?

A. Yes, it is.

Q. Was there anything in the wallet?

A. Usually—daddy got paid from the church, he was Assistant Janitor with my brother, he usually received a check every Sunday of forty dollars ($40) and usually he cashed that check to carry with him. His retirement check and his Social Security check went directly to Citizens Bank, so he usually **[197]** carried the church check with him.

Q. And did he carry the check in the form of a check or in cash?

A. No, sir, it was usually cash.

• • •

[198] ***Q. Have you ever known or did you ever know your father, Ben Tester, to not have a few dollars in his wallet? **[199]**

A. No, sir.

Q. What was his situation regarding transportation or an automobile at the time of his death on August the 26th?

A. He had no transportation. He rode the church bus to. . .

Q. Why? Why was that?

A. Prior to this, he had had (indiscernible) down on the four lane. He was starting to approach to pull out and a tractor trailer hit the front end of the car and totaled his vehicle.

Q. So, did he have an automobile at that time?

A. No, sir.

Q. Had he replaced the automobile that he had wrecked?

A. No, sir.

Q. And, how long before his death was this wreck?

A. It was probably six (6) weeks.

• • •

TESTIMONY OF DON COLLINS

[254] GENERAL BROWN: The State calls Don Collins.

DON COLLINS was called and being duly sworn was examined and testified as follows:

Direct Examination

By General Brown:

Q. Would you state your name and occupation to the Court, please?

A. My name is Don Collins. I'm an Agent with the Tennessee Bureau of Investigation.

Q. And, what has been your education and background in law enforcement, sir?

A. Eleven (11) years with the Tennessee Highway **[255]** Patrol; Associate Degree for Criminal Justice, Walter State; graduate of the Southern Police Institute; graduate of Tennessee Law Enforcement Academy at Donelson; various homicide schools.

Q. How long have you been a special agent of the Tennessee Bureau of Investigation?

A. Five years.

Q. So what is your total length of time in—as a police office, either as a highway patrol or TBI?

A. Fifteen (15) year (sic).

Q. Were you called to the scene of a homicide in the community of Braemar located in Carter County?

A. Yes.

Q. And, when was that?

A. It was on August 27th, 1981, around 4:00 P.M.

Q. How were you contacted?

A. I was contacted through the Carter County Sheriff's Department.

Q. And, about what time did you arrive there?

A. I arrived shortly thereafter. I made one phone call for assistance to another agent, Agent Bob Baird from Greenville, Tennessee. I arrived there around 4:30.

Q. Where did you go in the Braemar Community?

[256] A. I went to the residence of Ben W. Tester located at Route 2, Hampton, in Carter County, Tennessee.

Q. What did you find when you arrived there?

A. When I arrived on the scene—I was directed to the scene by a Carter County deputy. I arrived on the scene. I discovered that there was numerous Carter County law enforcement vehicles there. There was numerous rescue squad vehicles. There was by-standers in the yard. Police officers—correction, deputies, rescue squad personnel, and discovered the body of Ben W. Tester hanging by a white nylon rope from the limb of an apple tree.

Q. And where was this body hanging, where is the tree in relation to the house of Ben Tester?

A. The tree is located as you approach the house by a rock driveway, the house is located situated just to the right of the driveway. The tree is to the left, across the driveway from the front porch of the house approximately, in my best estimation, to be about 80 feet. Sixty-five to (65)—60 to 80 feet.

Q. And you do go up a hill going up that driveway to the house and the apple tree, is that correct?

A. That is correct.

[257] Q. Upon finding this situation, what did you do, sir?

A. The initial investigation, requested that the by-standers be moved back away from the curtilage of the residence, the yard area of the residence and the driveway in order to start a preliminary investigation of the body, itself, the grounds surrounding the body, the underlying area, the underlying grassy area, ground around the body, the clothing of the —of the body of Ben Tester. Ben Tester had been gagged. To examine the gag, to examine the rope, to examine the type of knots used, the method in which he was hung.

Q. Would you describe the situation regarding the body of the deceased and his clothing, other things that you observed?

A. Ben Tester was wearing a—a white, gold-striped shirt, designed gold-striped shirt. He was wearing pinkish-purplish slacks. He had brown shoes on, white socks. He had a T-shirt type—not—a T-shirt, strap-type T-shirt on. The shirt was open in the front with approximately four buttons missing. The shirt was pulled out—out of his pants and had rips on—a rip—long rip down the right side of the shirt. He had a gag **[258]** in his mouth. It—he had a white approximate—I didn't measure, but it was approximate (sic) five inch white nylon rope which was, in my terminology—terminology used what they call a logger's knot. This was a double-loop, one rope—one single rope with a double loop around the neck. One was put around the neck, another was put around the neck to where there was two loops around the neck tied and came up to a tree limb which I measured. I can't tell you without looking at the picture the distance. And then wrapped around the tree limb and tied with a knot on top of the tree limb.

Q. Was there any other damage to his shirt besides the—the rip in it?

A. yes, there was buttons missing from the shirt. There was approximately four buttons.

* * *

[268] Q. Let's talk about Exhibit 11. What—what is this in Exhibit 11?

A. Exhibit 11 is of the...

Q. And, if you'll stand back I think the lady on this side is having trouble seeing.

A. This photograph was taken to show that—it is the photograph of a tree limb to show that there's foreign vegetation-type material, which is similar in composition, to me, as the grass was on the ground. This would indicate that the grass from the ground had to go from the ground to this tree limb up in the tree.

Q. Where did you find grass in the tree in this picture? Would you—you point that out?

A. The little striations right around this knot, that's grass.

* * *

[269] Q. *** Did you recover the portion of the rope and the gag that was left on the body after the victim was cut down out of his apple tree?

A. Yes, I did.

Q. Do you have those? **[270]**

A. Yes.

Q. What are those two pieces of rope you have in your hand, sir?

A. These two pieces of rope are the rope that was around—the portion that was around Ben Tester's neck.

Q. And are the knots in those ropes the same as they were when you found them?

A. The knots in the ropes have not been touched.

Q. We offer these two pieces of rope as an exhibit.

THE COURT: Collective—Collective Exhibit Number 35.

(Collective Exhibit 35 marked and filed.)

GENERAL BROWN: And, also regarding the—the gag that has been shown in those photographs with which the victim was gagged?

A. This is the gag.

Q. What kind of material is that made of? How would you describe it?

A. This has been matched up with a portion of a sheet that came from Ben Tester's residence.

Q. We'll talk about the sheet later. The State offers this piece of sheet as an exhibit.

THE COURT: Thirty-six (36).

(Exhibit 36 marked and filed.)

* * *

[274] *** Q. Next we're referring to Exhibit 24 and if everybody can see I'll just hold it back here. Is that better?

A. Okay, this is the same window that I described there that was open. This shows the same window a little closer, excuse me. The screen, you can determine that there's a straight line edge on the screen there 'til it gets to a certain point in the corner. And the straight lines turns into a 'jaggered' area, then another straight line. To me this indicates that some type of sharp instrument or something similar has made this mark and this has not been done by a sharp instrument.

* * *

[275] *** Q. Would you explain for the Jury, please, this photograph that is marked Exhibit 26?

A. This photograph was taken of the livingroom area just as you come in the front door. As you walk in the front door this is the left portion of the livingroom area. This portrays a bookshelf of Encyclopedias lying on the floor, a stereo moved from the window area, disarrayment of the cushions on the couch, ornaments lying around and an overturned chair. And this portion is inside the house, the livingroom area just as you step in the front door to the ieft of the room.

Q. Would you explain Exhibit 27?

A. This is the same room. This is the door I just described as coming into photograph...

Q. Is that the front door of the residence shown in this picture?

A. This is the front door of the residence coming off the porch. This is the same livingroom area, except this is **[276]** walking by a fireplace and standing in a small hallway that leads to a bathroom that would be located almost directly in the center of the house. To the left of that a bedroom. And there's also a bedroom off to the left here. But this photograph was taken at a different angle to catch more of what was in the last photograph.

Q. Would you explain, then, Exhibit 28?

A. Exhibit 28 is a photograph of after the initial investigation discovering that Mr. Tester had four buttons missing, the photographs were completed. The entire house had been photographed, and I began a search in an attempt to define or to determine if—what had happened in the house, if there had been a struggle of some type to cause the torn shirt and the buttons missing, which would cause force for those buttons to pop off and that tear. I began looking for portions of that house (sic). This is me in the photograph, and I find two buttons. Where my fingers are pointing there's two buttons lying just at the end tips of my finger. This is in the livingroom area where the last photograph was taken. This would be about where I would be standing. This is the bottom of a portable-type fireplace.

Q. Would you show the Jury where these buttons were found in, well, the last two photographs? are they...

[277] A. It's not in these.

Q. ...not in this part?

A. Back—it's back where I'd be standing taking this.

Q. Those buttons are rather difficult to see in the photograph. Next would you explain Exhibit 29?

A. Exhibit 29 shows the—a third button discovered near the fireplace. Which would indicate—in front of the fireplace, and you can see the button here. The buttons have been identified

as coming from his shirt. Or similar to the ones he had on his shirt.

Q. This has been marked as Exhibit 30 in this case and looked like Exhibit 5 in a prior hearing or two. Would you explain this photograph, please?

A. This photograph is of Ben Tester's bedroom taken from the doorway leading from the livingroom. As you would come into the house the livingroom would be here. There would be a bedroom door here and this is standing in the door looking into the bedroom where the photographer took a photograph, as much as he could get, of the entire bedroom, which portrays the bed, the disarrayment of the bed linen, items taken out of chests, a dresser, the disarrayment of the drawers open on the chest, the dresser, items strewn in the floor. Also this is a curtain of the window that was open with a screen that **[278]** was out.

Q. Is this the bedroom on the front of the house?

A. This is the bedroom on the front of the house.

Q. Which side?

A. This would be the right front.

Q. As you're facing the house?

A. As you're facing the house.

Q. Would you explain this picture as marked as Exhibit 14? Let me stand back here.

A. This is—this is also in the bedroom of Ben Tester which was the last photograph. This is standing in the door just as you step in the door and turn, and this is a photograph of the wallet—open wallet of Ben Tester lying in the right front bedroom floor, just inside the door from the livingroom.

Q. Is this—is this the way you found that bedroom and—and then particularly the wallet?

A. That is exactly the way it was found.

Q. Did you examine the wallet to see what it contained?

A. The wallet was packaged, which I still—I have the wallet now.

Q. All right. Would you produce—do you have that and would you produce it now?

A. Yes.

[279] Q. Is this the wallet that was found in the floor of Mr. Tester's bedroom and that is shown in—in this picture?

A. Yes. This wallet has been examined for fingerprints, fibers, whatever. The black area you see on this is the fingerprint dust that they have used to try to locate some fingerprints. This is the driver's license of Ben W. Tester, Driver License Number 263922306, Date of Birth, 12-17, 1907.

Q. There are other identification (sic) and I guess photographs of relatives in there, too, is that right?

A. Yes. That's correct.

Q. Was there any money in the—the wallet?

A. There was no money in the wallet.

Q. We offer this wallet of Mr. Tester as an exhibit.

THE COURT: Number 37.

(Exhibit 37 marked and filed.)

GENERAL BROWN: This is marked as Exhibit 31. Would you explain it to the Court and the Jury, please?

A. This is a photograph of the residence telephone of Ben Tester which is located in a den. Would be—as you're facing the house, you come through the livingroom and go to the left and into the den. This area was not disturbed other than the telephone wire was cut, which is demonstrated here.

• • •

[280] *** Q. Next, explain this picture, Exhibit 33.

A. Okay, this is a—as you came—come into the—out of the den into the livingroom on the kitchen, this is the far side of the bar showing the kitchen sink, which you can see in the corner here. This is the underlying cabinets, the top cabinets. This portrays a—an open drawer. This also shows a silverware set, which the silverware had been disarrayed, a knife set which has been disarrayed. This also shoes medicine vials in a corner shelf.

Q. Likewise, Exhibit 16, this has already been testified to in this case by Richard Tester. What does this show?

A. This is the closet that I was talking about in the dining section where the china cabinet is located. This shows that the closet door had been opened. Also shows that the items **[281]** had been disarrayed in the shelf, itself. The china cabinet. Also shows empty coat hangers and only pants. It only demonstrates that there's pants in this closet with—with the empty hangers.

Q. And, last in this sequence of pictures, Exhibit 15 which again has already been testified to by Richard Tester.

A. This photograph is the bedroom, which would be called the left rear bedroom or the middle bedroom adjacent off to a small hall from the bathroom. It's located on the right side of the house to the rear, between the right front bedroom and the dining room. This portrays the scene as it was found. Open suitcases, dresser drawers open, disarrayment, bed clothing disarrayed. Also, demonstrates empty coat hangers in the closet.

• • •

[282] • • • Q. In talking to individuals about this case, did you have an occasion on September the 17th of 1982 to talk to one Harvey Gene, known as Joe Street?

A. On the 17th of September, 1981?

Q. Yes.

A. Yes, I did.

Q. And, how did this come about?

A. My area supervisor, special agent in charge of criminal investigations for the East Tennessee area, that includes Chattanooga, Cookeville, McMinnville, Knoxville, and **[283]** all Upper East Tennessee, he and I were following some leads in another section of the district. And we were summoned to the Carter County Sheriff's Office by the sheriff, George Papantoniou.

Q. What did you find when you arrived at the sheriff's department?

A. When I arrived there, if I'm not mistaken I made several phone calls and then I went straight upstairs in the old jail to—directly to Sheriff Papantoniou's office. There when I arrived Joe Street was there, the sheriff was there, later you came in, and the sheriff advised me that...

MR. STUART HAMPTON: We would object to what the sheriff advised him, if Your Honor pleased, out of the presence...

THE COURT: Sustained, unless it was in the presence of this defendant.

A. The defendant was there with the sheriff.

GENERAL BROWN: What did the sheriff advise you in the presence of the defendant?

A. The sheriff advised me at the time that the defendant, Joe Street, wished to make a statement concerning his involvement in the death of Ben Tester.

Q. Were either of his parents contacted or present?

A. I—the sheriff also told me in the presence of the **[284]** defendant, Joe Street, that Joe Street had requested that his father be there, that he was not there, that he was on his way.

Q. And did his—did Joe Street's father arrive?

A. He did.

Q. And what was done after Joe Street's father arrived?

A. There was some conversation with the sheriff and the defendant, Joe Street, concerning—in the presence of his father concerning being tried as an adult, the death penalty, and I—if I'm not mistaken, the electric chair might have been—the word 'electric chair' might have been used or... At that time I was discussing with Preston Huckaby the manner in which we wanted to do the interview. And, after the father arrived there I advised the father of the Interview and Interrogation Waiver. That was completed. The defendant, Joe Street, was advised of his rights according to the Miranda decision. And a ten page, handwritten statement was prepared in my handwriting as the defendant, Joe Street, stated to me.

Q. All right, first you've mentioned a—a juvenile interrogation form. What is that?

A. Since Joe Street was a juvenile I would not interview him without the presence of his—a parent, either his mother or father. And...

[285] Q. Was there any judge there as well?

A. There was a judge there, but the judge I did not see until the statement had been obtained and it was read back to the defendant and Judge Ray walked in just as I started the—the read-back to him.

Q. Now, who is Judge Ray?

A. Judge Jessee Ray is the Juvenile Judge of Carter County, Tennessee.

• • •

[Description and introduction of Exhibit 38, Juvenile Interview/Interrogation Waiver, and Exhibit 39, Admonition and Waiver form.]

• • •

[288] Q. *** After Joe Street was advised of these rights what was done?

A. After he was advised of those rights a handwritten statement was obtained from him through the process of question/answer and correction, and to see if each sentence written was true as he wanted it put on paper.

Q. Now, what was the procedure? How did—how did you take his statement?

A. The statement was, "Joe, if you want to tell the truth about the thing you tell me as it is, and I'll write down what you say." If there's some part of the procedure that—since I done the crime scene investigation and was aware of some of the facts at the scene, aware of some of the facts through another confession, there was—he was stopped and asked if this was true or did it happen another way or is this the way he wanted it put down, or if this was, in fact, the truth. And he was asked about specifics during the confession. There was no leading questions gave (sic) to him, and no information gave to him. It was just a—a question or a stop in the procedure to ask him if this actually happened in his—in—in the way he can remember it.

Q. What was Joe Street's emotional state before and—**[289]** and during your taking of this statement?

A. During the first—during the first initial interrogation Joe Street wept, cried openly. He was emotionally (sic), and that emotion was directed at what he was telling. He was showing emotion as to what he was telling about his involvement in the death of Ben Tester.

Q. You said he was crying. Were there tears on his face?

A. Yes.

Q. Did his father advise him anything what to do or what to say before or during the taking of this statement?

A. The best I can remember, Joe's father told him that he wanted him to tell the truth. He didn't want him to leave—to

hide anything, to leave anything out. That if—if there was anything that was on his chest that was bothering him to get it off his chest.

Q. Would you read to the Jury, please, the statement that he made to you under these circumstances? How many pages is it?

A. It's ten handwritten pages. Now, there is two forms before the statement was taken. One is filled out before and one is filled out after. Under *Tennessee Code Annotated* agents of the TBI are authorized to take sworn statements under **[290]** oath.

Q. Did you make this a sworn statement?

A. Yes, I did.

Q. What is the form that you filled out before the statement was taken?

A. This is Tennessee Bureau of Investigation Sworn Statement Form B1-0059. "Sworn Statement. Do you, Harvey Gene Street, solemnly swear that the statement you are about to give is the truth, the whole truth, and nothing but the truth, so help you god?" There's an 'X' marked by answer and—his handwriting, the defendant, Joe Street, he wrote, "Yes, sir." Signature, he printed his signature, and then I asked him that I needed—if he was going to swear to the statement I needed his signature in writing, and above his printed signature he wrote, "Joe Street." "This is a sworn statement of Harvey Gene Street. Sex: Male. Race: White. Age: 17. Date of Birth: 5-2-64. Address: Route 1, Hampton, Tennessee. As given: Preston Huckaby of the Tennessee Bureau of Investigtion, TBI, on September 17, 1981, at 9:20 P.M., at the location of Carter County Jail. This sworn statement and oath taken under the authority of *Tennessee Code Annotated* 38-502. Witness: Special Agent Don R. Collins, TBI; Preston Huckaby, TBI; Sheriff George Papantoniou, Carter County, **[291]** Tennessee." And the statement begins.

[Statement read into evidence, handwritten original introduced and shown to jury, Exhibit 40. This exhibit has been reproduced in typewritten form at page 353 of this Joint Appendix]

• • •

[310] *** Q. *** Agent Collins, you've testified that this statement was taken down in your handwriting, is that correct?

A. Yes, sir, that's correct.

Q. And, having read the forms and the oath where the defendant swore to that statement, would—can you explain how that the statement was read to him or—or read back to him at the end of the—the taking of the statement? How **[311]** was all this done?

A. The statement was read back to him, sentence by sentence. At the end of each sentence I would ask Joe Street if that statement is true, is that the way he wanted it on paper. And he would state yes. If there was corrections to be made he would tell me what the corrections he wanted made or what wasn't true or what he didn't say was true, circle that. I would have him to circle it, put, "This is not true," his initials.

Q. When were these portions circled? Was this during the statement or at the end?

A. No, this was during—this was during the initial taking.

Q. This whole statement and the...

A. No, correction. Let met correct myself on that. Those circles were made after.

Q. All right, this whole statement is—is marked as Exhibit 40. And you've explained the first and last page being the affidavit parts of it. There are—are certain corrections in the statement where there have been portions marked out and there appear to be initials beside it. How—what—how was this done? Can you explain if there's a—appears to be a red marking above where a word 'were' was **[312]** inserted on the first page, for example.

A. As I said, during the taking of the statement I would write down what he said. I would read it back to him as it was taken. I'd say, "Is this true? Is this the way you want me to put it down?" And he's say, "That's right." As I was reading it I would find that I mis—didn't add a word or put a word, and I would add the word and ask him to initial it to show that it was not done later on.

Q. Would you show the Jury in that statement one or perhaps two of these places where he has initialed corrections or—or words added? Just show what you mean by that. Come on around, if you can.

A. On the first page, the word 'were' was added with a notation. And every time there was a correction made or a change I'd have him initial it with a red pen, J.S., Joe Street. At the bottom of each page I would have him to initial it to show that it was read to him and that the contents of that page he knew was there and he initialed it as this being true.

Q. The next page shows a—a correction, something marked out.

A. This is misworded. I read it back to him. He didn't like that word. He wanted to say "...whip him." So, I **[313]** wrote "...whip him" above that and had him initial it. The bottom of each page, again, initialed. Had been read to him, he understood it.

Q. And, show the Jury the circled portions of the statement that the defendant told you were not true as you were reading the statement back to him.

A. Reading the statement back to him, I would read and he indicated to me that that was not true, that—that which he corrected on the next page or thereafter. I asked him to take a red pen, which I carry a red pen and a black pen for these purposes. And he makes a circle and I draw—I put an asterisk, in his handwriting he puts, "This is not true, J.S." Another indication that he says—of what he had told me that I had wrote down

the way he had told me, that that was not true, that it happened another way, I asked him to circle that and put out in his handwriting, "This is not true," and initial it. Again at the bottom of the page it's initialed. All the mistakes, whether—if I made a mistake, some mistakes I made, I also asked him to initial those. Like for instance here I didn't add, "...that day." That was my mistake, so I added that and asked him to initial it. Down here again is another mistake. I can't tell what I've scratched out there but it was a mistake, and I added "...Big K, Elizabethton," and **[314]** he initialed that. Same way all the way through, any mistakes, anything that he didn't say that he wanted taken out, I would scratch the whole sentence out and have him to initial it at both ends and the bottom of each page.

* * *

Q. Go ahead and have a seat. Was the defendant, Joe **[315]** Street, under arrest during the time of the taking of this statement? What was his situation?

A. Previously I thought that he was under arrest. But I discovered that he was not under arrest. As a matter of fact, he had been told by you several times during the course of the interview that he was free to walk out any time he wanted to. Any time he wanted to leave he could do so.

Q. Do you recall approximately how many times during this statement that I advised Joe Street that he could get up and leave any time?

A. I can remember at least three.

Q. And, what happened after the statement was taken? Was he placed in custody or—or let go home?

A. No, he was allowed to go home.

Q. That was after making that statement?

A. That was after the making the statement, the forms were completed. At the end of the statement he was allowed to go home, yes.

Q. Whose decision was that that he would be allowed to go home?

A. That was the decision of—of you, yourself, the sheriff, and the Juvenile Judge, also in consultation with the Attorney General, Lewis May.

[316] Q. In that statement that you have read it says regarding the—the gag, the statement of Joe Street you have just read reads as follows: "I tore a piece of sheet to make a gag." Did you find any such sheet in—in your search...

A. Yes, sir.

Q. ...of the Tester residence?

A. Yes, I did.

Q. Do you have that with you?

A. Yes.

Q. Would you produce it, please? Does the—the gag that you have here in any way fit this sheet that you found in the Tester residence?

A. Yes, it was matched as coming from this piece of material.

Q. Where did you find this sheet?

A. This sheet was found—after you come in the front door of the livingroom you walk straight like you're going into a little hallway to go to the center of the house to the bathroom. There's a closet there. Lying in the floor near the doorway to the livingroom that goes into the hallway toward the bathroom, this is where this was discovered.

* * *

Cross-Examination

By Mr. Stuart Hampton

* * *

[329] Q. How many people are indicted in this murder case?

A. There's three—three juveniles were arrested on a juvenile petition. If I'm not mistaken there's four adults indicted.

Q. Well, we have Joe Street indicted and Eugene Montgomery indicted, a juvenile, indicted; Jeff Causby, a juvenile, indicted.

A. Yes, after transfer hearing they were indicted, yeah.

Q. And we have Mr. Bobbit indicted.

A. Yes.

Q. We have Mr. Peele indicted.

A. Yes.

Q. Clifford Peele.

A. Yes.

Q. We have Glenida Peele indicted.

A. And Tommy Dale Taylor.

Q. Tommy Dale Taylor indicted. How many statements has Clifford Peele given in the course of this investigation—how many statements has he given to either you or the sheriff's department?

A. He has given—he has given me one that I personally reduced to handwriting.

Q. All right.

[303] A. The number of statements, he gave one on January the 11th, 1982, which was obtained by the sheriff's department. And I have a copy of that. And, to actually tell you how many, I couldn't tell you.

Q. Actually, Agent Collins, he gave you two statements, didn't he?

A. He gave me one concerning a burglary.

Q. All right, but—he gave you one concerning a burglary, gave you one concerning this...

A. Murder.

Q. Do you know how many statements that he has given the sheriff or the sheriff's deputies in connection with this case?

A. I have not been provided but with one of those statements, and that was the statement taken on—best of my memory, January the 11th, 1982.

Q. You mean that you've never been given the statement that —that he made on January the 11th?

A. Yes, I got...

Q. You have been given that?

A. Yes, I did get that.

Q. And of course, we—we've had several hearings in connection with this case?

[331] A. That's correct.

Q. We had a—in fact, we've had about three or four hearings in connection with this case.

A. The best I can remember there's been five or six.

Q. All right. And you're aware of the statements that Mr. Peele gave at these various hearings?

A. Yes, that's correct.

Q. So, there'll be five statements, according to your testimony, that Mr. Peele gave and—and two written statements that you took. And certainly one that the sheriff took.

A. Did you say five?

Q. You say he testified five times, is that correct?

A. No, I said there've been at least five hearings. He's testified in three, I believe.

Q. You wouldn't dispute if—you wouldn't dispute it if I said four?

A. No, I would not.

Q. And then you add the two statements that you took from Mr. Peele?

A. That's correct.

Q. The one statement the sheriff has taken?

A. That's correct.

• • •

[333] *** Q. Now, the statement that Mr. Peele gave to you on the 16th and the one that he gave to the sheriff on September the 11th, there's quite a bit of disagreement in those two statements, isn't there?

A. The statement that Cliff Peele gave me on the 16th and the one Joe gave me on the 17th?

Q. No.

A. Now, what—repeat that question, please.

Q. I say, the statement that Mr. Peele gave you on the 16th and the one he gave on the—on the—January the 11th, there is some very material variations between those two confessions, aren't there?

A. There is some differences, but the most that I observed in reading them, there was alot of names added and—and the method in which it happened.

[334] Q. Well, I asked you if there was any material difference, and if he added names that would be a material difference, wouldn't it?

A. And I told you.

Q. All right. Have you taken a statement from Tommy Dale Taylor?

A. Yes, I did.

Q. And that statement that you took from Tommy Dale Taylor concerning this murder case did not in any way implicate Harvey Joe Street, did it?

A. In the statement itself Joe Street's name is not mentioned.

Q. Now, from your investigation of this case, did you determine if there is anything missing from the house of Ben Tester?

A. In conferring with the family members to determine—the only thing I could determine was missing from the residence is mostly short-sleeved shirts. And possibly some shoes.

Q. What about a check?

A. To me that has not been determined. There's no checks ever turned up that I am aware of. In my investigation.

Q. Well, have you—have you ever found any of those items that were missing from the house?

A. There's been items that have turned up but not been **[335]** identified by the family as belonging to Ben Tester. That I know of.

• • •

[336] *** Q. Well, from the course of your investigation you have not been able to corroborate any of the statements given by my client by other evidence that you've found someplace else?

A. You talking about physical evidence?

Q. Physical evidence, yes.

A. Fingerprints, hairs, fibers? Is that what you're...

Q. Well, about things missing from the house, now.

A. Not from Joe Street.

Q. Okay. Now, in the course of your investigation there were witnesses who either talked to you or talked to other members of the sheriff's department concerning this crime which you

have included in your report to Nashville, which actually alibied Joe Street as far as where he was on the evening of the 26th?

A. Yes, there's a statement or two in there that alibis, says that Joe Street was at a certain location with someone the **[337]** night of August 26th.

Q. Now, Agent Collins, have you made any attempt to talk to any of these witnesses, yourself, personally?

A. I talked to Jeff Causby. The others were conducted by the Sheriff's department. This was a joint operation.

Q. But, in order to do a full investigation of a criminal homicide, would it not be reasonable for the chief investigator for the TBI to go out and contact these alibi witnesses that would alibi for Joe Street?

A. In a joint operation combined with another law enforcement agency the TBI assists that department and doesn't go in and take over unless directed by the Attorney General. This was not done. It was a combined, coordinated investigation. The Attorney General's office did not request TBI to completely take over this investigation outside the authority of the Sheriff of Carter County.

• • •

[339] *** A. I received everything except the fingerprint analysis completed on the fruit jar and I got one—everything except the fingerprint analysis on the fruit jar.

MR. STUART HAMPTON: Now, in order to enlighten the Jury, at some time after the discovery of the body of Ben Tester someone discovered a fruit jar in his house, is that correct?

A. That is correct.

Q. And what did—what was in the fruit jar?

A. There was a typewritten note.

Q. And, when was this fruit jar and the typewritten note discovered?

A. I'll have to go back in my notes. It was approximately two or three weeks after that some time. The best I can remember.

Q. Two or three weeks after the murder?

A. Yes.

[340] Q. And, what did the note say?

A. I can get the note for you.

Q. You—can you remember what it said?

A. Said in essence, "We did not mean to do this to this man, but he knew us and we had to do something about it." The best I can remember.

Q. I believe at the discovery of this my client was in custody at that time?

A. That is correct.

Q. And the other juveniles, Eugene Mongtomery was in custody; Jeff Causby was in custody at that time?

A. That's correct.

Q. And, so, you have sent the jar and the note off for fingerprints?

A. And have received the note back and the jar but not the report on the fingerprint analysis that was done on the latent prints on the jar.

Q. Now, from the FBI report of the 86 items and the TBI report have you received any information that would implicate my client, Harvey "Joe" Street, in the murder of Ben Tester?

A. In everything that I have submitted?

Q. Yes, sir.

A. To the laboratory? In the way of physical evidence, **[341]** no, other than what he has told me, what's in the statement. Everything that's collected that's in this report, there's nothing reflects back on Harvey "Joe" Street.

• • •

[347] *** Q. White piece of torn cloth?

A. Correct.

Q. Now, this white piece of torn cloth, is that the same piece of cloth that you have introduced here as Exhibit Number 41?

[348] A. That's correct.

Q. This morning you testified that that sheet was in the hall of the Tester home.

A. That's correct.

Q. But your report says it came from the back bedroom.

A. All right, there's a hall there that separates the livingroom and the back bedroom. This was found right at the bedroom—it's a small hall, found right there at the bedroom and the livingroom.

Q. Agent Collins, I—I don't want to reprimand you, particularly in public, but we're here on a murder trial that involves this boy's...

GENERAL BROWN: Your Honor...

MR. STUART HAMPTON: ...life.

GENERAL BROWN: ...if Mr. Hampton wishes to make an argument...

MR. STUART HAMPTON: And when you gave testimony...

GENERAL BROWN: ...we'd ask that he save it until later. I object.

THE COURT: Sustained. Sustained. Just ask questions.

MR. STUART HAMPTON: You gave testimony this morning it was the hall. I particularly asked you if you found it in **[349]** the hall, and you said yes, didn't you?

A. Yes, I did.

Q. But your report says that you found it in the back bedroom, doesn't it?

A. Well, I was incorrect this morning. My report is correct.

• • •

[353] *** Q. Approximately 12 inches of white nylon—nylon rope—rope sample that you obtained from Brown's Supermarket?

A. That's correct.

Q. Piece of white cloth utilized as a gag?

A. Correct.

Q. Nylon white rope obtained from the neck of Ben Tester?

A. That's correct.

Q. Now, the samples that you obtained from Brown's Supermarket and sent off to the FBI, together with the rope or a portion of the rope which I assume you cut off from the—the rope of Exhibit Number 34, is that correct?

A. Now, word that...

Q. Repeat that? Okay. According to this, you took a sample of this rope that was used to hang Ben Tester, and you took a sample of the rope that you obtained from Brown's Supermarket and sent it to the TBI and/or FBI for an analysis of that rope, did you not?

A. Yes, I did.

Q. And I believe that the F—the Federal Bureau of Investigation report that's contained in this says that the rope that came from Brown's Supermarket and the rope that was **[354]** used to hang Ben Tester are not similar in any way, shape, form, or fashion?

A. I think they stated three characteristics. I'll try to find that for you.

Q. You want me to help you?

A. If you have it available there, that'd be fine. I have it.

Q. Let me read this to you. "Q-3a, and Q-3b specimens are dissimilar to the K-3 rope sample with respect to size, construction, and fiber composition."

A. That is correct.

Q. So, the rope to—that was used to hang Ben Tester did not come from Brown's Hardware?

A. It didn't say that, it just said that the rope which was taken —a sample taken from four different spools of rope at Brown's Supermarket, they said the rope sample that I obtained there did not—was not similar with the one used to hang Ben Tester.

Q. Well, you...

A. Didn't say that it...

Q. ...went to Brown's Supermarket and got a sample of all the rope there, didn't you?

A. That's correct. But the report didn't say that the **[355]** rope didn't come from Brown's Supermarket.

Q. All right. It just said that it was not the same as that that —which came from Brown's Supermarket.

A. It said that the rope that I submitted was not the same and dissimilar in size, construction, and fiber composition.

• • •

[336] *** Q. From your investigation and the facts that you found out have you since determined that there was a female in the bedroom of this house with Ben Tester prior to his death?

A. By hearsay I have, yes.

Q. And who was that female?

A. By hearsay, Glenida Peele.

Q. Mr. Collins, do you have other people who have not been indicted under investigation to the murder—for the murder of Ben Tester?

A. Do I personally have them under investigation?

Q. Yes.

A. Of people that have not been indicted?

Q. Yes.

A. The sheriff's department, Sheriff George Papantoniou is currently furthering his investigation. I am conducting an investigation only from this point on at the request of the Attorney General's office.

Q. Do you know how many people are under investigation **[364]** for the alleged murder of Ben Tester who have not been indicted?

[Objection made and ruled upon.]

[365] *** A. I have been in the presence of someone that has been indicted, presently indicted, that have named other individuals. And, names approximately, the best I can remember, 18 to 20.

MR. STUART HAMPTON: Eight or what?

A. Eighteen (18) to 20.

Q. Eighteen (18) to 20? Other...

A. The best I can remember, I'm not for sure.

Q. Eighteen (18) or 20 other individuals?

A. That is correct.

Q. Would it be fair to say, then, that this investigation is not...

A. A total. A total.

Q. Right.

A. Including the ones that's—that are indicted.

Q. Would it be fair to say that this investigation, then, is not complete?

A. According to the information that the sheriff possibly has I'd say that it is not incomplete.

[366] Q. Do you know who these other persons are that have been implicated in the murder of Ben Tester?

A. I can name the ones that I have positively been—that I positively know, but I would not guess at any name.

Q. All right, would you name those for us, please?

A. First of all, Kelly Gene Banner, Tiny Bailey, Gary Street. I don't—I can't care to mention any more without—without going into something that—that's the investigation of the sheriff.

Q. What about Don Grant?

A. Yes, Donald Grant's name has been brought up.

Q. Or Carr?

A. David Carr? His name has been mentioned, but to say that —the best of my rememberance, I couldn't say whether it has been directly involved, indirectly, or whether he was an aider or abettor or what.

Q. Now, on September the 16th, 1981, did you take a statement from one Clifford Peele who confessed to the murder of Ben Tester?

A. September what? I...

Q. Sixteenth (16th).

A. Yes.

Q. Do you have that confession in your file?

[367] A. Yes, I do.

GENERAL CROCKETT: Your Honor, I don't know where we're going with this, but, of course, the confession of someone who is not here is not admissible at this time. Through this officer. Another co-defendant in this case.

THE COURT: Wait to see whether he asks—asks him about it.

GENERAL CROCKETT: I assume that's what he—that's where he's going. It's—it's not admissible.

MR. STUART HAMPTON: Do you have that, sir?

A. Yes.

Q. Did you personally take this statement from Clifford Douglas Peele?

A. Yes, I did.

Q. Would you read that statement into the record, please?

GENERAL BROWN: Your Honor...

GENERAL CROCKETT: We—Your Honor, for the reason that we previously made, we would object to that. It's just not the proper way to do it.

THE COURT: Sustained. Sustained, unless it's in the presence of the—the statement was taken in the presence of this defendant.

MR. STUART HAMPTON: Well, this defendant does not [368] object, Your Honor. I'm his lawyer...

THE COURT: The...

MR. STUART HAMPTON: ...and I'm asking that it be done.

THE COURT: ...the State is objecting, and the objection is sustained.

GENERAL BROWN: Again, we'll make Mr. Peele available to be called for the defense.

MR. STUART HAMPTON: The—Your Honor please, it's very material to the defendant to get this statement of Mr. Peele before this Jury and to question Mr. Collins concerning this statement and how it is the same or similar to the statement of my client, Joe Peele (sic), that has been read into the record.

THE COURT: If you want Mr. Peele to state what he knows about it you can call Mr. Peele. If you want to ask Mr. Collins

anything about the taking of the statement now's the time to do so or any time you want to. But you can ask Mr. Collins about the taking of the statement but not what's in the statement. That would be hearsay.

MR. BILL HAMPTON: Well, we could file it for...

MR. STUART HAMPTON: Well, it's not hearsay on the part of the...

[369] MR. BILL HAMPTON: ...we could file it for the record, Your Honor, and then introduce it when Mr. Peele takes the stand.

THE COURT: Certainly.

MR. BILL HAMPTON: Thank you, Your Honor.

THE COURT: For identification.

MR. BILL HAMPTON: Yes, Your Honor.

(Exhibit 42 marked for identification)

MR. STUART HAMPTON: Would you staple this together for us?

The Court: Will be for identification only, number 42.

MR. STUART HAMPTON: Exhibit Number 42 to the testimony of Mr. Collins has a "Waiver of Rights," Clifford Peele, and a sworn statement by Clifford Peele that the statement is true. The statement, itself, and an affidavit of Clifford Peele. Twelve (12) copies of photographs. Now, Mr. Collins, let's direct our attention to the statement by—given by Mr. Joe Street to you on September the 17th, which is filed in this record as Exhibit Number 40.

* * *

[373] *** Q. Now, what time did you arrive at the jail on the evening of the 16th when this statement was given?

A. I arrived there about 8:45 to 9:00, some time around there, the best I can remember. Eight—it was 45 minutes, maybe an hour—at least 45—30, 45 minutes, something like that, before Joe Street's father arrived.

Q. And you made some telephone calls?

A. I made at least two that I know of.

Q. And you went up to the sheriff's office in the old jail?

A. That's right, upstairs, up the steps.

Q. And, who did you find there?

A. When I walked in Joe Street and the sheriff were there. There was...

Q. Do you know—do you know of your own knowledge how long Joe had been with the sheriff at that time?

A. No, I do not.

Q. And you've made no investigation to determine how long he'd been there?

A. No, I did not. He was there, he...

Q. And you don't know whether there was any conversation between Joe Street and George Papantoniou prior to your arrival?

[374] A. Apparently there was some conversation. In the presence of Joe Street the sheriff advised me that he wished to make a statement.

Q. Okay.

A. And, Lynn Brown, the Assistant Attorney General, evidently was in the building somewhere, because he showed up shortly thereafter and, so, evidently there was some conversation between Joe Street and the sheriff way before I ever got there. What transpired there I do not know.

Q. And, Joe Street's father then showed up later?

A. He showed up within minutes—within 30 minutes or so, 45, something like that, after I got there. I'm not exactly sure on how many minutes.

Q. And at that time you asked Mr. Street to sign this juvenile waiver form? Is that correct?

A. Yes, I asked—I advised him what the form was. Read it to him and he was evidently aware of what the—what was going to ber transpired. This was read to him, filled out by me, and he signed it.

Q. That's Exhibit 38?

A. Yes.

Q. And, then, Mr. Street left, did he not?

A. No, sir.

[375] Q. Well, he's here, Mr. Collins.

A. Mr. Street was there from the time—I think he left the room one time, the interview ceased and was not began (sic) again until he returned. He was there from the time that every word in this confession was written down until the time it was signed and he witnessed several portions of this statement, did not leave until after it was completed and took the defendant, Joe Street, home. He did not leave one time for over a period of five minutes, which in—the interview/interrogation was ceased. He was present the whole time that Joe Street, the defendant, confessed to me to the murder of Ben Tester.

Q. Was Joe Street's mother there?

A. That I do not know. I did not see her.

Q. Did you, Officer Collins, ever ask Joe if he wanted his mother there?

A. Joe Street—I didn't have to ask Joe Street, Joe Street advised me and the sheriff and the Attorney General that he did not want his mother there. He requested his father.

Q. Do you know whether or not Joe Street's mother requested to be present?

A. Not through me. I was—I was not aware that she requested to be present. At no time did he...

[376] Q. Well, was there any...

A. ...request to see his mother.

Q. Was there any desire on the part of the sheriff not to have Mrs. Street there?

A. Like I said, I didn't know that she was there. So, how—I—I don't know. I couldn't answer that.

Q. Now, before you commenced this interrogation of Joe what was his emotional state?

A. For the first 15 to 30 minutes he wept openly, he cried through emotion of what he was...

Q. What—whup—he cried?

A. Yes.

Q. And you say he cried for a period of—which could be as much as 30 minutes?

A. Fifteen (15) to 30 minutes of the initial part, yes.

Q. During the course of this examination which—well, let me ask you this first: How long—when did you start the interrogation?

A. The official—the rights waiver, the juvenile Interview/Interrogation Waiver was signed at—start initiated at 9:20 P.M. He was advised of his rights at 9:27...

Q. Just answer the—just wanted to know the time it started.

[377] A. I'm giving you the times.

Q. 9:20?

A. 9:20.

Q. And, when did the interrogation cease?

A. Officially, at 1:30 A.M.

Q. That's the following morning, 1:30 A.M. in the morning of the 20—I mean the 18th?

A. Yes.

Q. Now, during that course of that four hour examination did Joe ask to go home?

A. He did not specifically put it in those words. He asked for me, in essence, he wished that I would hurry, that he would like to go home.

Q. Well, he did say in four occasions that he wanted to go home?

A. Two or three, maybe four occasions.

Q. What was your reply to that?

A. My reply was? My reply was is that he was there to tell the truth, and if he wanted to tell the truth I was going to put it down. That he had been told that he could get up and walk out by the Assistant D. A. three times that I know of. That he was not under arrest, that any time he wanted to walk out he was free to do so. The only thing he told me was he **[378]** wished I would hurry, that he wanted to go home.

Q. Now, if the D. A. told him three times he could go home and you told him—and he told you three times he wanted to go home, why didn't he go home?

A. He didn't tell me he wanted to go home. I'll repeat my answer again. He stated he wished that I would hurry so he could go home.

Q. So he could go home.

A. He didn't say...

Q. Now, why didn't he get to go home?

A. He was wanting me to hurry. I told him I was finishing it just as fast as I could.

Q. Why didn't he get to go home? Answer the question.

A. There was no one holding him, counselor. He was told at least three times by the D. A. he could walk out any time he wanted to.

Q. Well, you've got a 17 year old boy there, you've got yourself there, you've got your—the sheriff there, you've got your supervisor there, and the boy says, "I want to go home," and you didn't let him go home, did you?

A. He didn't say he wanted to go home. You're misinterpreting—you're saying what was not said.

Q. Well, tell the Jury...

[379] A. I'll tell the Jury...

Q. ...again.

A. ...he said that he wished I would hurry and right this down, hurry, speed things up, so he could go home.

Q. He said he wanted to go home, didn't he?

A. So he could go home.

Q. He said he wanted to go home.

A. He never mentioned the word 'want', w-a-n-t, 'want'. He never mentioned that word. Specifically, like, "I want to go home." He said to hurry, that he wanted to go home, to hurry up and finish.

Q. Now, he knew prior to making this statement to you that he could go home after the statement?

A. That I do not know. That was a agreement (sic)...

Q. You...

A. ...evidently made by the—someone other than I. I did not make that agreement.

Q. I know you didn't make the agreement, Mr. Collins, but in your preliminary examination you said that there was an agreement...

A. Apparently there was. He went home.

Q. And he knew this agreement before he gave the statement.

[Objection made and ruled upon.]

[380] *** MR. STUART HAMPTON: There was an agreement and he did go home?

A. Apparently there was an agreement.

Q. And he stayed home for a period of five days thereafter?

A. From September the 17th 'til he was arrested on September 21st. The best I can remember. Without looking at my record. September 21st, if I'm not mistaken, is the day that he was served a warrant or September 22nd.

• • •

[385] *** MR. STUART HAMPTON: Now, Agent Collins, after—Agent Collins, in—in your presence was Joe Street ever threatened with the electric chair before he gave this statement?

A. I wouldn't say he was threatened. He was advised of [386] what could happen to him, but in the way of a threat, no.

Q. Do you know if he was ever promised anything if he would make a statement?

A. That was a conversation between he and the sheriff. Now, you'd have to...

Q. Did you over—did you overhear the conversation?

A. There was some conversation—like I said, there was a conversation about being tried as an adult in the Criminal Court of Carter County, that—that—that murder carried the death penalty and he could be electrocuted, but as far as the electric chair, it was not in the way of a threat by Sheriff Papantoniou no way. As long as I was there I never heard Sheriff Papantoniou threaten Joe Street. But, to answer your question, no.

Q. Did the sheriff ever in your presence tell him that if he did not make a confession that he would send him to the penitentiary for his involvement in the burglaries that had been previously committed?

A. I never heard Sheriff Papantoniou state that to Joe Street or anyone else.

Q. In all the time that you've been a highway patrolman and a TBI agent have you ever known anyone who ever confessed to a First Degree murder and was allowed to leave the [387] jail, go home for five days?

A. No, I have not.

Q. Would that not indicate to you that some deal had been made?

GENERAL CROCKETT: We would object, Your Honor. That would again call for a conclusion.

THE COURT: Sustained.

GENERAL CROCKETT: He can offer an explanation if he has one.

MR. STUART HAMPTON: Now, during the course of this statement did you use a tape recorder to take down the conversation of yourself, the sheriff, and Joe Street during this confession?

A. No, I did not.

Q. Of course, the Tennessee Bureau of Investigation has tape recorders, don't they?

A. Yes, but the Director of the Tennessee Bureau of Investigation is strictly against the use of tape recorders in obtaining statements.

Q. Well, if we had for this Jury a tape recording of the conversation between you and Joe and the sheriff and Joe and Joe and you and Joe and the sheriff that we could play for this Jury, do you not feel like that that would be—would [388] reveal whether or not this statement was voluntarily given, that all the statement was written down? Would that not help the Jury?

A. That would help the Jury in many ways, especially if Mr. M. B. Street's going to sit here and say that he wasn't there the whole time.

Q. Now, of course, during this statement Joe just didn't start off and start giving a statement, you ask him questions?

A. Yes, there was a question—it was, "Tell me how it happened." He'd go into detail, I'd write it down, "Is this what you want me to write down?" I'd write it down, I read it back, "Is this what you said, is this true?" "Yes." "Go on. Continue. Tell me again."

Q. All right, now, on the day prior to this, of course, you obtained the confession of Clifford Peele?

A. The 16th, yes.

Q. The day before.

A. Yes.

Q. And you wrote that confession down?

A. Yes.

Q. And, you knew what it said?

A. Yes.

Q. And the sheriff knew what it said?

[389] A. Yes.

Q. And, of course, you wanted the confession of Peele and Street to be consistent?

A. No, I wanted—not as—it would be consistent if they told the events as they happened. But, however, I took the statement as Joe Street told me the events and sequence as it happened. I wrote it down, asked him—read it back to him, asked him if that's the way it was, "Yes." "Continue on, tell me what happened next." I'd write it down, whatever he told me, read it back to him, "Is this what..." "Yes." "Go ahead." And I think this...

Q. Well, now...

A. ...is what was bothering him, that I was taking so long. Because I wanted to write it down just like he said.

Q. Now, you did not write it down what Joe...

GENERAL BROWN: Your Honor, he's not letting the witness finish his answer.

THE COURT: Let—let him answer each time.

GENERAL CROCKETT: Go ahead and finish your answer, Mr. Collins.

THE COURT: Let him finish before you ask the next question.

A. I was writing down exactly what he said. There was **[390]** some points in there that—that according to my investigation on the scene that I—I couldn't place as—as being true and accurate or being accurate or maybe he wouldn't have knowledge of it. There was no suggestive answers such as suggesting him to tell me a certain thing that he didn't know, just only what he knew. And I would ask him a question about something, what about a certain area of the house, what happened in this area of the house. I did not tell him what happened in the area of the house, I would ask him what happened in that area of the house. And he would advise me of what happened; I would write it, read it back to him, and ask him if it was correct.

Q. From your knowledge of the Peele confession, though, you did suggest to him certain things that happened in sequence?

A. You used the wrong word. I did not suggest anything for him to tell me.

Q. You didn't say, "Well, didn't it happen like this, Joe?"

A. No.

Q. You're not telling this Jury that you wrote down the words that Joe Street said to you, are you?

A. I wrote it down like he told me. Maybe there was some words in there that he didn't use, but I would write it **[391]** down in there like he told me, and then read it back to him and

ask him if that's the way it was. He would say yes.

Q. Well, he would make a statement and you'd put it in your own words?

A. Ninety-five percent (95%) of it was in his—in his own words. I might have used some words in there, very few—not words, I would describe it in detail. Or, I would ask him, like, he would say, "Rope." I'd say, "What kind of rope, Joe?" In one instance, I think at the first there, I said—he said, "The rope. Used the rope to do this with the rope. Got a rope out from under the," I think, "truck seat." He said, "Got the rope out from under the..." I said, "What kind of rope, Joe?" And Joe said, "A white, nylon rope." And that's what I wrote, white nylon rope. When he said rope.

Q. Now, during the course of this interrogation of Joe of course the sheriff was there?

A. Yes.

Q. And, from time to time the sheriff would do things that you didn't like?

A. That's customary with—when you have...

Q. I'm not asking you what's customary, just answer the question 'yes' or 'no', and then explain it.

THE COURT: Answer 'yes' or 'no' if you can. If you **[392]** can't answer it any way you would like.

A. Yes, the sheriff interjected several times.

MR. STUART HAMPTON: And, in fact, it got so bad that you had to call the sheriff down, didn't you?

A. I can't answer that 'yes' or 'no'. I can explain.

Q. Well, did you have to call him down and tell him not to interrupt anymore?

A. Yes, I did. No, I didn't tell him not to interrupt, I just told him that I was wanting to put it down exactly the words that he

was saying the best I could. The sheriff was not suggesting anything, he was—he was catching things that we had discovered in the investigation. Some things that he had personal knowledge of that I didn't and some things that I had that he didn't. But he would not ask suggestive or leading questions, he would question Joe, himself. And Joe at times admitted that —that there was some inconsistencies, which he'd correct me and—or correct what he had said before I wrote it down, and I wrote it down.

Q. Did you write down the inconsistent things that Joe said?

A. Are you talking about if he said something...

Q. When he said some inconsistent things did you write that down?

[393] A. No, I did not.

Q. You eliminated that from the statement?

A. I didn't put it in the statement. I wrote down just exact...

Q. Well, actually the Jury does not have...

GENERAL BROWN: Your Honor, he's not letting him answer...

THE COURT: Let him—let him answer. Go ahead. Explain the answer. You cut him off again, Mr. Hampton.

A. What's in the statement is what Joe Street says is true.

MR. STUART HAMPTON: But there's certain things that Joe said that were inconsistent that are not in the statement for the Jury's view?

A. No, they're not. They were not written down before if it was caught. Like I said, he would tell me something and I would write it. If I caught something that I didn't think was right then I would question him about it. The sheriff made several interjections. The sheriff didn't even stay in the room all the time, he was in and out. The sheriff might have interjected

several times, brought up a point that—that just wasn't right. But they were not recorded in here then circled by Joe Street like the other two paragraphs.

[394] Q. The sheriff had the statement of Peele there, didn't he?

A. If I'm not mistaken, the sheriff and Lynn Brown both had a statement of Cliff Peele. I'm not sure whether the Attorney General did, but there was a statement there. Not—I did not use one. There was a statement there.

Q. Now, that's the statement—or Peele's confession on the 16th, the day before?

A. That's correct.

Q. And that—the sheriff followed that statement...

A. No, the sheriff don't have to follow the statement. The sheriff's got a pretty good—pretty good memory. He could probably tell you word verbatim, almost, what's in there.

Q. So he knew what Peele had said. And when Joe would get out of line with Peele's statement he's make him correct it?

A. No, he wouldn't make him correct it, he'd ask him a question. Not in sequence. Now, you're—you're trying to say that —that—trying to take this statement and—and put it in a sequence like Cliff Peele's. No, that's incorrect. If there was something that during the course of the investigation that come up that we found that Cliff Peele corroborated and Joe Street was telling us something different that we had **[395]** already corroborated we would ask him about it. And he would tell us in his opinion and what he wanted to put on the paper, and that's what was put on paper.

Q. From time to time the sheriff said to him, "Now, Joe, that's just not the truth, is it?"

A. He may have stated that—that sort of thing.

Q. "And the way it happened was this way, wasn't it, Joe?"

A. I said he did not make any suggestive or—he didn't make any suggestives of—suggestions as to what Joe Street to state. He made several interjections on inconsistencies. On the investigative findings plus the confession.

Q. In fact, Agent Collins, isn't it true that on one occasion he said to you, "There was no conversation about meeting at the Big K. Cliff told me to be at the pool room so he could get hold of me to go to Ben Tester's." And, when he said that in fact you jumped up from the chair and said, "You're lying, Joe," and walked out of the room. And—and discontinued the interrogation.

A. No, that is incorrect. I don't interrogate or interview anyone in that manner. If they don't want to talk, you know, they can go back to the jail cell or they can leave, whatever. I don't—I don't use those tactics.

[396] Q. Well, if it was...

A. If it was incorrect—if it was incorrect I asked him a question and no suggestive, just asked him a question, and he wanted to correct he could, if he didn't I'd put down what he wanted to say.

Q. But Joe told you this as being the truth, and you wrote it down, didn't you?

A. That's right. And when I read it back to him...

Q. And if his...

A. ...he discounted it.

GENERAL BROWN: Your Honor, let him finish the answers.

THE COURT: I believe he finished that time. But don't interrupt him before he finishes.

MR. STUART HAMPTON: And it was inconsistent with Peele's statement, wasn't it?

A. He corrected it on over.

Q. Answer the question first.

THE COURT: Answer it...

MR. STUART HAMPTON: It was inconsistent with the statement Peele had given you, wasn't it?

A. From—according to what Peele told me, that—that was inconsistent from—from Peele's testimony or statement.

Q. And, did you not so advise him that that was not true?

[397] A. I did not tell him that Cliff Peele said this or said that. I just asked him if that statement was true or not true or if there was actually some—something else happened other than meeting at the pool hall.

Q. Well, if he suggested that it was true, then how do you know it wasn't the truth?

A. Because I...

Q. Because it wasn't like Peele's, was it?

A. Yeah, but I didn't tell him it wasn't like Peele's.

Q. But you got him to circle it and to say it wasn't true, didn't you.

A. I—no. I read it back to him and asked him if it was true. He then told the truth, and I—I asked he—I asked him if he would put a circle around what he said was not true and then write...

Q. Well, now, wait just a second.

GENERAL BROWN: Your Honor, he's not letting him finish.

THE COURT: Were you finished, Mr. Collins?

A. I'm finished.

THE COURT: All right.

MR. STUART HAMPTON: Wait just a second, Mr. Collins, you weren't there at the murder scene. You didn't see this **[398]** murder happen, did you?

A. No, I did not.

Q. And you weren't with these defendants, if they did commit the crime, you weren't there?

A. No.

Q. Well, how would you know the statement was true or untrue?

A. I just told you, it was inconsistent with the information that I had.

Q. What information did you have?

A. I had a confession from Cliff Peele.

Q. Now, Joe makes another statement here. Joe says, "Jeff Causby brought the pot back. Jeff split the pot between Cliff and I. We did not let—let Jeff Causby know about the plan to break in Ben Tester's. We did not tell Jeff Causby anything." Now, of course, that's what Joe told you, correct?

A. That's correct.

Q. And you wrote it down?

A. That's correct.

Q. And then you told him it wasn't true, didn't you?

A. That's correct.

Q. And you asked him to change it, didn't you?

A. I didn't tell him it wasn't true, I just—I told him **[399]** —I asked him, I said, "Are you sure this is what happened?" or something similar to that. I told him that is he—"Are you sure this is what happened?"

Q. Well, you said more than just, "Are you sure?" didn't you, Mr. Collins?

A. I couldn't tell you the exact words that I could (sic). I let him know that it was inconsistent with—with some other information.

Q. And you let him know in any—in no uncertain terms by jumping up and running out of the room and discontinuing the interrogation, didn't you?

A. That is incorrect.

[Court recessed.]

* * *

[404] *** MR. STUART HAMPTON: Mr. Collins, have you determined from your investigation that a truck was not stolen and used in this alleged homicide?

A. I did not determine that. Criminal Investigator Rick Morrell and—Rick Morrell and Sheriff George Papantoniou determined that.

Q. So, in his statement where he says that Eugene would steal a truck someplace and did steal a truck...

[405] GENERAL BROWN: Object, Your Honor. Again it would...

GENERAL CROCKETT: It calls for hearsay and a conclusion. In fact, it would call for a conclusion based on hearsay.

THE COURT: Sustained.

MR. STUART HAMPTON: All right. Mr. Collins, Joe in his statement said that he called Tiny Bailey—Bailey to meet him at the foot of Tinker Hill. "I walked to the foot of the hill and over to Brown's (sic) Castle and met Tiny Bailey. I gave Tiny Bailey $3.00 and told him to buy some rope and bring it back to me or hide it. Tiny told me that he would hide the rope at the car wash at the bottom—in the bottom of the old vacuum cleaner where the door was." From your investigation have you determined that Tiny Bailey did not buy this rope?

A. Yes.

Q. So that portion of the statement that Joe gave you is a figment of his imagination or at least a lie?

GENERAL CROCKETT: Your Honor, that again would call for a conclusion.

THE COURT: Sustained.

MR. STUART HAMPTON: Have you determined from your investigation that the statement—the following statement **[406]** which Joe made, I'll read it to you, "That he had stole a pickup truck at a shop down behind Brown's Hardware."

[Objection made, question asked again as follows:]

[407] MR. STUART HAMPTON: "Eugene told Jeff and I that he had stole a pickup truck at a shop down behind Brown's Hardware." Now, the question is: From your investigation was there ever a pickup truck stolen behind Brown's Supermarket?

THE COURT: Do you object, General? Answer the question.

A. I did not determine that there was a vehicle stolen at this particular day behind—at a garage or behind Brown's Supermarket on this—at this particular time.

MR. STUART HAMPTON: Has anybody since the 26th day of August, 1981, down through and including today, which is September the—I mean July the 21st, has anybody ever told you that a pickup truck had been stolen at Hampton behind Brown's Super—Supermarket?

A. Yes, I have had information that there—at no time that there was one—a wrecker stolen behind there which was later wrecked. Not a pickup truck. But there was a pickup truck that was left parked there all the time with the keys in it that belonged to...

Q. A stolen truck?

A. No, that it had—that it had been taken without [408] permission, but it was parked back where—where it was taken from.

Q. But you never had—had any information that the truck was stolen behind Brown's Supermarket?

A. A truck—if you want—if you want to call a wrecker a truck, yes.

Q. A wrecker?

A. A wrecker. A wrecker.

Q. You mean a wrecker that you haul in other cars with?

A. Yes.

Q. Okay. But there had been no truck stolen to your knowledge?

A. Not involving this homicide, no.

Q. Okay. Joe in his statement says that this particular truck that was stolen or allegedly stolen was a white 1972 Chevrolet pickup truck. do you know if a white 1971 or 1972 Chevrolet pickup truck was used in the commission of this crime?

A. No, I do not. I know—I—it wasn't a Chevrolet pickup truck. '71 or '72.

Q. Well, it wasn't a '71 or '72 Chevrolet pickup truck, white. So that part of the statement is, from your investigation, just simply not true?

[409] A. It's inaccurate, not...

Q. All right.

A. Wasn't the... Like I said, I—I wrote it down just like he said.

Q. Joe Street in his statement says that he—he, Eugene, and Jeff met Clifford Peele at 8:30 at the Big K in Elizabethton, Tennessee. From your investigation—from your investigation

have you reason to believe that that is not a true statement?

A. I have corroborated that that is a true statement.

Q. That he met at 8:30?

A. Right around 8:30, yes.

Q. At Big K?

A. Yes.

Q. Joe in his statement of September the 16th said that Glenida Peele was not involved in this homicide. Have you determined that Glenida Peele was involved in the homicide?

A. He didn't—he didn't...

GENERAL CROCKETT: Your Honor, again that would—that—we're asking this witness to make all kinds of conclusions in this matter and...

THE COURT: Sustained.

MR. STUART HAMPTON: In fact, Glenida Peele has now [410] been indicted, is that not correct?

A. Yes, she has been indicted.

Q. But in Jeff's confession—Joe's confession of September the 17th he gives no information that would—that she was involved in this homicide?

A. He did not state in his confession where Glenida Peele was present during the homicide.

Q. Now, in Joe's confession he states that Tommy Dale Taylor was not involved in the homicide, is that correct?

A. He mentions the name...

Q. Some Miller guy?

A. ...Miller, yes, was not involved.

Q. Miller actually was Tommy Dale Taylor?

A. Yes, I—I discovered two weeks later the true identity?

Q. And, Tommy Dale Taylor has been indicted in this case?

A. Yes, he has.

Q. So when he said in his statement that Tommy Dale was not involved, that's not a true statement?

A. When he states—repeat that.

Q. When Joe states that Tommy Dale Taylor or Miller was not involved in this homicide, that's not a truthful statement, **[411]** is it?

A. Only thing I can say is that I have corroborated through other statements the same—the same. Evidently there has been evidence obtained not by me that caused the indictment of Tommy Dale Taylor. That was done by the Sheriff of Carter County.

Q. Well, you found no evidence that Tommy Dale Taylor was even involved in this yourself, have you?

A. Tommy Dale Taylor, I have no evidence. The Sheriff of Carter County has that evidence. I have no evidence that he was involved, but evidently there—there's evidence that he was. He was arrested and indicted and...

Q. You've never been furnished with any of that information?

A. Only possibly the statement of Cliff Peele of—made January the 11th, 1982.

Q. And you are familiar with that statement of Cliff Peele given January the 11th, 1982?

A. Not in detail. I couldn't—I couldn't tell you without looking at my—at the statement to give you the details of it.

Q. In other words, you'd have to read it to get the details?

[412] A. Yes, I would have to read it over carefully before I could make any definite statements.

* * *

[415] *** MR. STUART HAMPTON: From your evidence that you had sent off to TBI and FBI you have determined that the gag used on Ben Tester on the night that--of this homicide came from a sheet that was found in the bedroom or hall of his home, is that correct?

A. Yes. As I stated awhile ago, the sheet was at the entrance of the livingroom. There was a little pillow laying there. There was at the—in the bedroom, the sheet was.

Q. So, when Joe in his statement he says that—that the **[416]** gag came from a sheet on the chair in the den, that simply is not a true statement, is it?

* * *

A. Simply because the sheet—the gag that was matched to the sheet—because the sheet was found in the bedroom doesn't mean that it could have been (sic) anywhere in the other part of the house—it could have been anywhere in the other part of the house prior to it being found where it was found.

MR. STUART HAMPTON: Well, was there a sheet on the chair in the livingroom?

A. No, there was not.

Q. And you say you found a wallet of Ben Tester in the right front bedroom?

A. That's correct.

Q. According to this statement, Eugene Montgomery took some checks that belonged to Ben Tester from the house, some checks. Has there been any evidence that you know of produced to the effect that checks were actually taken from Ben Tester's **[417]** house?

A. There's none been developed by me. There—also that checks were cashed somewhere in Valley Forge using Jeff Causby's I.D. by Eugene Montgomery, the best I remember. As far as I know, there has been no checks turned up from the

personal checking account of Ben Tester or any checks that have turned up in the way of insurance, retirement, whatsoever. I think there is one check still missing, if it hasn't been recovered by Criminal Investigator J. C. Wilson who is—was assigned to run that lead down from a retirement—some type of retirement benefits check which is missing. At the time was missing. If it has been returned or turned up since then I have not been made aware of that.

Q. Well, that'd have been some ten months ago. If it were going to turn up it would have turned up by now, wouldn't it?

A. If it had been cashed it would have turned up, that's correct.

Q. Right. That's all.

Redirect Examination

By General Brown

* * *

[419] *** Q. You have testified that what you wrote down was what Joe told you.

A. That's correct.

Q. And, these circled portions in particular that—that you've testified in going back, when you wrote them down did you know from your investigation they weren't true?

A. Did I know from my investigation...

MR. STUART HAMPTON: Your Honor, let me—let me make this observation. If he'll—if he's going to be allowed to go in it in this fashion I think he opens the door for the defense to go into it in the same fashion.

GENERAL BROWN: The defense has already gone into this. I believe that Mr. Hampton asked you about both those—those circled statements and what you knew about it at the **[420]** time...

A. Yes.

Q. ...you wrote them down?

A. Yes.

Q. Did you know that those circled portions in this statement, that being that—that there was no conversation about meeting at the Big K. "Cliff told me to be at the pool hall so he could get hold of me to go to Ben Tester's." When you wrote that down did—did you know from your investigation it was not true?

A. Did you go to the second one—you went to the second one. I was...

Q. Okay, I went to the—the second one. The last part of the second one, "We did not tell Jeff Causby anything."

A. I knew it not to be true. I mean, I knew it not to be consistent with what my investigative findings had discovered.

Q. But Joe told you that?

A. Joe told me that and I wrote it down.

Q. So did—did you write down what—what Joe told you, regardless of what you thought about it, whether it was consistent or inconsistent?

[421] A. Not every time.

Q. Would you explain that?

A. If he—if Joe told me something that—he would get off on Ben at a different place or doing something different or saying something that I knew that—the position of something in the house, the position to where the things were before they were disarrayed, the way they were after they were disarrayed, matters like that I would question him on it. Something like this, I went ahead and wrote it down because he said it that way, and I wrote it down then come back and read it to him and corrected it.

Q. But after you would—on things that you would question him about, what would you write down?

A. Repeat that. You're confusing me. Repeat what you're saying.

Q. All right. I—I may not be asking this question very well. But, if—if he told you something, as you've indicated, and then you asked him questions about it before you wrote it down, wrote anything down, what would you write down?

A. I would write down—after questioning him I'd write down what he would want put in this. There's another procedure that criminal investigators use which is to make—**[422]** purposely make mistakes to have them corrected by the person giving them to show that they're very well aware of what's in the statement.

Q. Was that technique used in this case?

A. By me it was, yes.

Q. You said in answer to Mr. Hampton that there were points that you would not place from my investigation that—that were not so, but you put them down anyway?

A. Yes, sir.

* * *

[427] Q. *** You named for Mr. Hampton four other people who are under investigation in this matter. I believe he asked you about Kelly Banner, Tiny Bailey, Gary Street, and Don Grant, is that correct?

A. David Carr.

Q. And David Carr, the fifth one, you're right. Any of those individuals related to Joe Street?

A. Yes.

Q. Who and how are they related?

MR. STUART HAMPTON: We object to that as being immaterial, if Your Honor please.

THE COURT: How is that material, General?

GENERAL BROWN: Your Honor, it would show a reason that this defendant would have to lie about them.

THE COURT: Objection overruled.

GENERAL BROWN: Among these people that Mr. Hampton asked you about who are related to Joe Street and how are they related?

A. Gary Street is a older (sic) brother to Joe Street; Kelly Banner is an uncle to Joe Street.

* * *

TESTIMONY OF GERALDINE MORRIS

[453] Direct Examination

By General Crockett:

Q. What is your name, ma'am?

A. Geraldine Morris.

Q. And, you were formerly Geraldine Bowling?

A. Yes, sir.

Q. Where were you living in 1981? August of 1981?

A. On Tinker's Hill, Route 2, Hampton.

Q. And that's where Ben Tester lived?

A. Yes, sir.

[454] Q. How far did you live from Mr. Tester?

A. About three houses up above.

Q. Do you know Joe Street?

A. Yes, sir.

Q. And, did you know the other young men who have been charged in this crime?

A. Yes, sir.

Q. How far do you live from Joe Street's house?

A. Just right across from him.

Q. And that's also close to the Richard Tester—Richard and Betty Tester residence?

A. Yes, sir.

Q. All right. Do you recall the week of August 26th of last year, 1981, the year that—or the week that Ben Tester was murdered?

A. Yes, sir.

Q. During that week did you see the defendant, Joe Street?

A. Uh-huh (affirmative).

Q. Did you see anyone at his home visit with him during that week?

A. I seen Glenida Peele, Clifford Peele, Eugene Montgomery, Jeff Causby, and his brother was home, Gary.

[455] Q. Gary Street?

A. Yes, sir.

Q. On what days did you—Mr. Tester's body—assuming Mr. Tester's body was found—discovered on Thursday, the 27th, what days of the week do you recall that you saw these these people together?

A. Glenida and Clifford was up there Monday, Tuesday, Wednesday, and Thursday, of the morning. And then, on Wednesday, August 26th, Eugene Montgomery and Jeff Causby and Joe and Gary and some more was up there in the backyard.

Q. That was on Wednesday?

A. Yes, sir.

Q. What were they doing when you saw Joe Street, Gary Street, Eugene Montgomery, and Jeff Causby?

A. They were out in the backyard shooting a gun and they were drinking beer.

Q. Did you see Joe Street with them at that time?

A. Yes, sir.

Q. Do you know what kind of a gun it was? Was it a handgun or a rifle?

A. It was a little gun.

Q. Well, is that...

A. I mean, like a pistol.

[456] Q. A pistol as opposed to something you fired from your shoulder?

A. Yeah.

Q. And was Joe Street there at that time?

A. Yes, sir.

Q. Did you have any conversation with Joe Street on that day, the 26th?

A. About 2:30 him and Eugene were sitting on the porch and he hollered and borrowed a cigarette off me.

Q. Okay. Do you know where Clifford and Glenida Peele were at that time?

A. No, sir.

Q. Were they there when you went over and gave him the cigarette at 2:30?

A. No, sir.

Q. Did you see him leave his house later that day?

A. Well, him and Eugene walked off the hill.

Q. About...

A. After I gave him the cigarette, a little while after.

MR. BILL HAMPTON: I—I didn't hear her, Mr. Crockett. I didn't...

THE COURT: Repeat it again, please.

A. Him and Eugene left off the hill after I gave him a **[457]** cigarette.

* * *

TESTIMONY OF DR. CLEVELAND BLAKE

[475] Direct Examination

By General Crockett:

Q. State your name, please, sir.

A. Dr. Cleveland Blake

Q. What is your occupation, Dr. Blake?

A. I'm a physician and pathologist specializing in forensic pathology.

[476] Q. What training do you have in that field?

A. A pre-medical education at Bob Jones University in Greenville, South Carolina. Undergraduate and graduate education at University of Tennessee in Knoxville. I have a year's graduate research work in two universities in Germany as a Fulbright Scholar in '54 and '55. From '55 through '58 I attended the U.T. Medical College in Memphis, School of Medicine, graduated December of '58. Internship at the Methodist Hospital in the year '59. '60 through '63, four years of residency; two at the Baptist, one at the Methodist, one at Kennedy Veterans Administration Hospital in Memphis. I took

and passed the American Boards in Clinical and Anatomic Pathology November 1963.

Q. Have you been engaged in the work of clinical pathology and forensic pathology since that time?

A. I worked five years at Holston Valley in Kingsport and I began doing forensic pathology then. Have been doing 15 years of forensic pathology. And in 1980—May of 1980 I was admitted to, examined and passed the American Boards of Forensic Pathology, May 1980.

Q. Have you been permitted on other occasions, sir, to testify concerning autopsies and pathological—the **[477]** work that you do or work that you did in the field of forensic pathology?

A. Yes, sir, I have.

Q. On many or few occasions?

A. Many occasions.

Q. Doctor—well, first of all, Your Honor, we feel that Dr. Blake is competent to testify as an expert in that field.

THE COURT: The Court—the Court declares him an expert.

* * *

[481] *** A. *** This body was a—that of a mildly obese, elderly white man, measuring 167 centimeters in length, and that's 5'7" to 5'7½". I estimated his weight at 175, 185 pounds. And I described him as appearing in his late 60's or early 70's. I did not know the exact age at the time. I didn't—didn't know the indicated age. Then I proceeded to study the general condition of the body, that is the rigor mortis, settling changes, color changes in the body, and to get some idea about the general condition of the body. Then my attention focused on the specific injury as we would call it, or wound. Not in this case an open wound, but an injury in the sense of the important findings on the body. And, I gave considerable description on that, paying

close attention to the nature of the materials that were around the face, mouth, and neck.

Q. And, what did you find concerning the special injuries that you noted around the face, mouth, and neck?

A. Well, there were two separate—two separate compondents to this. One was a gag or—I guess you would call it primarily a gag made of white sheet material. Looked to be stripped up portions of perhaps a bedsheet. White material. And this was tied around the mouth, pulling a deep furrow in the mouth and waded into the **[482]** mouth, cutting a very deep crease. The mouth had—the teeth had been removed in earlier years, and there were no dentures in place. And, this pulled the—pulled a very deep groove into his face. I say a dentureless face, I mean that he had no teeth obvious on there. And there was alot of drying and discoloration with purple changes around the—the lips. The tongue was protruding beside the gag which had cut rather deep into the face.

* * *

[483] *** GENERAL CROCKETT: In addition to the gag which had—through Mr. Tester's mouth, what other injury did you note? How was the gag tied?

A. The gag had been tied by knotting around and behind the neck to keep it into the mouth. It was—I described it as a constricting ligature of white cloth suggesting sheet material. It was tied in a simple knot at the back of the neck. Well below the bulge on the back of the head, so straight back on the back of the neck.

* * *

[489] *** Q. All right, sir. Did your autopsy reveal whether Mr. Tester was unconscious or not when he was—when the rope was placed around his neck and he was hanged?

A. I cannot state that. I rather think that he was in partial state of consciousness. Because it would depend on whether or

not the rope had previously been tightened as a means of coercing or forcing the individual for a period of time before the rope was hung to the tree. So I cannot say that he was totally unconscious at the time the rope was placed around his neck. He could have been conscious or partially conscious.

* * *

TESTIMONY OF BOBBY F. COLBAUGH

[504] Direct Examination

By General Brown:

Q. State your name to the Court and Jury, please.

A. Bobby F. Colbaugh.

Q. Where do you live, sir?

A. Route 3, Elizabethton, Tennessee.

Q. What part of Carter County is that in?

A. That's in the Keeneburg Community, Watauga and the Range Community.

Q. And what do you do for a living, sir?

A. Well, I did work at Beunit Fibers. I'm on leave of absence now or terminated up there. But, my sons operate Colbaugh's Dairy and I'm also a Judicial Commissioner of Carter County.

Q. You have been appointed Judicial Commissioner by the County Court in Carter County?

A. Yeah, I'm the oldest Judicial Commissioner **[505]** appointed.

Q. You're a farmer as well, is that right?

A. Partially.

Q. I believe you'd like to get out of here and finish putting up some hay today?

A. Probably.

Q. Is that right? Some time in June did you have an occasion to be present at the Carter County Jail when the defendant in this case, Joe Street, was questioned concerning the murder of Ben Tester?

A. I did.

Q. Do you remember what day that was approximately?

A. It was right—it was on the 27th, it was on a Sunday and that's the last Sunday in June. Around 10:30 or somewhere in that neighborhood of the night. I was there writing warrants and...

Q. This was just last month?

A. In—right.

Q. And, how did you come to see Joe Street that evening?

A. Well, I was in the office that night writing warrants. And, during that time there was a note sent down or one of the jailers came down and said that Joe **[506]** wanted to talk to you, Lynn Brown, or somebody about the case. That he wanted to confess to it. And—to his part in it. And during that process I was sitting there at the end of the desk and they—I believe they called you on the telephone. And, of course, before that Donnie Shepherd had brought him down and read him his rights.

Q. Did—who'd Donnie...

A. Then the sheriff turned around and repeated them. He didn't know that Donnie had. In the meantime he—he wanted to talk in front of Donnie, John Henson, and the sheriff and you. Well, it—he turned around and changed his mind and had Donnie sent out of the office. Well, while they were talking—the sheriff was talking to you on the telephone. And then he let Joe talk to you on the telephone, right? All right, then he—at the time he was talking to you Joe would ask him, after he got done, if he cared if I stayed in there. And he said no, that

I was—knew his family and such and that he knew of me. And that he didn't care and he—they dismissed Donnie and left the sheriff, John Henson, and myself in there. And, so, it just processed from there. George, after he got done with the conversation, hissen (sic), he let him talk to you and then went on to their **[507]** questions after he read him his rights. George repeated his rights to him.

Q. So he had his rights read to him twice?

A. Twice.

Q. And was that before any questions were asked of him?

A. Right.

Q. That would be his rights under the—the Miranda warnings?

A. The Miranda, right.

Q. Is that correct? After he had been advised of his—his rights twice did he make any statement as to his participate in the killing of—of Mr. Ben Tester in Hampton?

A. Well, he made—the first statement he made that he would like to talk and get it off—and then be—get off as light a sentence as posible. Then he was asked questions—he was asked to go out—if he wanted to look at the truck, and he said yes, which is just behind the wall of the sheriff's office. And, so, I sat there and they asked me—took me on with them while they take—took him out to the truck. And he identified the truck as positive (sic) being the truck that was used. **[508]** And George also asked him if there'd been any changes, and he said not that he knew of. And the tailgate was down on it, and they asked him to explain where Mr. Tester was at on the tailgate, what position, where he stood, and that he explained who was holding his head while he placed the rope around his—that he placed the rope around his neck. And, I or sheriff one, I—I didn't ask no questions, very seldom, because I thought I—I was there protecting his Constitutional rights to see that he

wasn't mistreated or anything. And then I asked him—I'm sure I did, I said, "Joe, why in the world did you—did you do it?" And he said, "My uncle forced me into it. Made me do it." During that process.

Q. Who is—who...

A. And he named—he named...

Q. ...who is Joe's uncle that he...

A. Kelly Banner, he named Kelly Banner as his uncle that made him do it, and said he was the only one that showed any emotion. And—but one girl named Shelby something, I forget her last name, but said she was standing in the driveway. And she started screaming and running, and run down the driveway. Now, I—I don't remember her last name.

[509] Q. What did Joe tell you on this evening of June the 27th, just last month, what did he tell you was his part in hanging Mr. Tester in that apple tree?

A. Just placing the rope around his neck.

Q. Joe told you that—that he placed the rope around Mr. Tester's neck?

A. Right. That he was the one that put it around there, was...

Q. Where...

A. No, that he was—said he was also said he was afraid not to.

Q. Did he say where he was when he—he placed the rope around Mr. Tester's...

A. He was standing on the driver's side of the pickup truck, which would be the left side looking from the back at the tailgate. And, I forget now he said was holding him up while he put the rope around his neck. Well, Clifford Peele was who he said was holding him.

* * *

By Mr. Bill Hampton:

* * *

[513] *** Q. All right, were you and the sheriff just talking or eating supper or buddy-buddy, or what were you doing? Just talking with the sheriff?

A. Well, we wasn't eating supper, that's for sure, but, we were in there—I don't really know what we were discussing at the time. I don't remember.

Q. All right. And the approximate time that Mr. Street arrived in the room, to the best of your ability to recollect?

A. It was some time around 10:00 at night. It was up in the night.

Q. All right. And did Mr. Street say anything to the—what was the first thing that he said to the **[514]** sheriff or to you directly that you recall? What was first said when he walked in the room?

A. Well, after they read him his rights he just—George asked him and he'd sent word down or a note down, and he said that he'd like to—to talk to somebody and—so that he could get off as light as he could.

Q. Did the sheriff or did you or did Mr. Shepherd or Mr. Henson have him sign a form or Miranda waiver where—you've seen a Miranda waiver, Mr. Colbaugh.

A. Yes, sir.

Q. You deal with these things every day.

A. Not—I don't—not to my knowledge that he signed a Miranda waiver.

Q. Did you ever see a Miranda waiver in that room, written one?

A. No, not to my knowledge.

* * *

[516] *** Q. Of course, you knew that Mr. Stewart Hampton and I were this young man's attorney? Did you not?

A. He was—he was asked about that and I believe that he also made the statement that he'd called Stewart and he was busy and that he would be there the next day.

Q. In fact, even Mr.—Mr. Brown over here, Assistant Attorney General sitting here in the white coat who—who knew Joe Street from—from his father having a business in Hampton, Tennessee, you even called him on the phone, did you not, or George?

A. No, I—I wouldn't have no idea what he said over the telephone. That—what Lynn said to Joe.

Q. What did Mr. Street say on his end of the phone?

A. He just said that—talking about that Lynn would be up the next day to talk to him.

Q. To talk to him?

[517] A. Right.

Q. All right. So you knew, you and the High Sheriff of Carter County, knew that the Assistant D.A., Mr. Lynn Brown sitting over here in this white coat, was going to come in and talk to him the next day. And you knew he had a lawyer. And you went ahead and talked to him that night.

A. Well, now, that's not up to me to decide who talks to who and who don't. I'm there to protect both sides, not to pass judgment on nobody. If it was you or anybody else and they was bringing you down and I was asked to sit there and see what was said, I'd be more than glad to for the protection of both sides.

Q. All right. Now, you say in this purported statement, Mr. Colbaugh, that Mr. Street named Kelly Banner, or implicated

Kelly Banner. Did you ever hear Mr. Papantoniou state anything to him about Kelly Banner before he allegedly made this statement?

A. Not to my knowledge I don't.

Q. Well, who else did he implicate in this thing, in this purported statement that you and the High Sheriff of Carter County...

A. They went over two or three names. He mentioned **[518]** Cale Hazelwood and Don Grant.

Q. All right, so—so now you're saying he's...

A. He's...

Q. ...implicated his uncle, Kelly Banner?

A. That's who he said he was afraid of, why he did it.

Q. All right. And Cale Hazelwood?

A. Right, said he was...

Q. Do you know Cale Hazelwood, Mr. Colbaugh?

A. Very—very well.

Q. Where's Mr. Hazelwood? Is he a citizen of Hampton, Tennessee?

A. Right. Possibly.

Q. Do you know Donald Grant?

A. Right.

Q. Did he implicate Donald Grant?

A. Right.

Q. All right. And, according to your statement...

A. He just said they were in the yard. He didn't say nothing...

Q. According to your statement here, says, "Street also said there were about 14 people present at the murder."

[519] A. George asked him if there was ten people. He said there was more. He said, "Was there 20 people?" He said there were less. When the narrowed it down, he said, "Well, was there 15?" He said, "No." He said, "Was there 14 — 13 or 14?" And he said, "Yeah." They narrowed it down to around 14 people in there, he said around that many in the yard, but he also at times said that he couldn't remember because he had drank so much beer that he was pretty high and he couldn't remember everybody that was in the yard.

Q. All right, he said, 'A', he was afraid of Kelly Banner, his uncle?

A. Right.

Q. Then he said, 'B', he was drinking heavily?

A. Right.

Q. And couldn't remember alot about it?

A. Right.

Q. In this purported statement. Now, whose idea was it to take him out to this truck? Did George take him by the arm and says, "Come out here, you're going to identify this truck, Mr. Street"?

A. George asked him if he wanted to see the truck? And he said he didn't care, yes, that...

[520] Q. Asked him if he wanted to see the truck?

A. If—right.

Q. And, so then what took place?

A. Just went out the office door and around the truck sitting right—it's impounded right by...

Q. All right, you walked—did you walk out with them, Mr. Colbaugh?

A. Yeah, they asked me go to out with them. I...

Q. Did anybody else walk out with you?

A. No, sir, there was just the four of us.

Q. All right, now, let me back up in time. At the time this purported statement was taking place was Mr. Henson in the room, also?

A. Right.

Q. Mr. John Henson?

A. John Henson, Sheriff George Papantoniou, myself, and Joe.

Q. When you left to walk around this truck that was purportedly used in this homicide was Mr. Henson with you?

A. Yes, sir.

Q. And you, Mr. Colbaugh?

A. Yes, sir.

Q. And the sheriff?

[521] A. Right.

Q. And the defendant in this case?

A. Right.

Q. All right. And, when you walked out what did George say?

A. When we went to the truck?

Q. Yeah.

Q. He asked Joe if that was the truck that was used. If there'd been any changes made in it.

Q. He said, "That's the truck that was used in the homicide, is it not?"

A. He asked him if that was the truck that was used. And Joe said yes. And...

Q. All right, what else—what other part of the conversation ensued out there? Was that it? You walked back into the room?

A. They went back to the tailgate and the sheriff asked him where Mr. Tester was placed on it. And he showed him. And where he stood at the left rear end of it. And while the other guy held him that he put the rope around his neck, he said.

* * *

[526] *** Q. Just a minute, Your Honor. Mr. Colbaugh, were you asked to reduce this purported statement to writing?

A. Yes, sir.

Q. And, when were you asked to do that, sir?

A. It was probably two or three days later I was told that—that I would have to make—I don't know how long after. It was two or three days later, I'd say, that I—that I wrote that statement on what I remember as—as I remembered it down.

Q. And who asked you to do that, sir?

A. The sheriff.

Q. Did the sheriff ever ask you to reduce it to writing the same day it was allegedly made?

A. No. No.

* * *

[528] *** MR. BILL HAMPTON: Okay, Mr. Colbaugh, will you look at this and see if that's the same statement as the **[529]** other one, for purposes of the record?

A. That's—yes, sir.

Q. All right, sir. Would you mark that as whatever exhibit number it is?

THE COURT: Exhibit Number 43.

(Exhibit 43 marked and filed.)

MR. BILL HAMPTON: Now, Mr. Colbaugh, according to your testimony just a minute ago, it was three or four days after

this statement was made that you reduced it to writing at the request of the sheriff, is that correct, sir, or incorrect?

A. That's correct.

Q. All right, sir. So that would have been 27th, 28th, 29th, it would have either been the 30th or the 31st—30th or the 1st of July?

A. It—it could have—some time in the first of July, now, I...

Q. Around the first of July, to your best recollection?

A. Right.

* * *

TESTIMONY OF RAY WILLIAMS

[541] Direct Examination

By General Crockett:

Q. State your name, please sir.

A. Ray Williams.

Q. Ray, what is your occupation?

A. A carpenter and a constable.

Q. You hold a public—the public office of constable in Carter County, Tennessee?

A. Yes, sir.

Q. You're elected to that office and have been for how many years?

A. Six year (sic).

Q. All right, sir. And you earn your living as a carpenter?

[542] A. Yes, sir.

Q. As part of your duties—part—as a carpenter do you work in the Carter County Jail on occasion?

A. Yes, sir.

Q. And make repairs to the Carter County Jail?

A. Yes, sir.

Q. Repairs and additions and improvements. Do you—were you working there in November of 1981?

A. Yes, sir.

Q. And during that period of time was Joe Street then in jail at the Carter County Jail on the charge of the murder of Ben Tester? Was he a prisoner at that time?

A. Yes, sir.

Q. On the—on or about the 23rd day of November, 1981, did you suffer the loss of any items that were taken from your Jeep at the Carter County Jail?

A. Yes, sir.

Q. And, where was your Jeep—well, what was taken?

A. A Carter County walkie-talkie. It's a portable...

Q. Police, walkie-talkie?

A. Yeah, it belonged to the Carter County Sheriff's **[543]** Department.

Q. All right, sir, and that had been left in your Jeep?

A. Yes, sir.

Q. And, were you working at the jail at that time, doing work inside the jail?

A. Yes, sir.

Q. Now, where was your Jeep parked at the jail?

A. Out in the front parking lot.

Q. Were there any jail cells that are on the second floor that overlook that parking lot?

A. Yes, sir, there were three or four. I've not been in every one of them, but there's several up in front of it.

Q. As a result of your investigation to determine who stole the walkie-talkie out of your Jeep did you go up to the second floor of the Carter County Jail and have occasion to question certain prisoners that were there as to what, if anything, they had observed on that day?

A. Yes, sir.

Q. And, did you talk to several prisoners about what they had seen?

A. Yes, sir.

[544] Q. Did you talk to Harvey Joe Street concerning what he had seen?

A. Yes, sir.

Q. And, was he an occupant of one of the cells at that time?

A. Yes, sir.

Q. All right. As you—well—well, just relate, if you would, to the ladies and gentlemen of the Jury what conversation you did have with him on that day. On the 23rd of November, now, 1981.

A. Well, on that day, that's the day that the walkie-talkie were taken (sic). So, every time you park in front of the jail someone upstairs—two or three of them will holler out and ask you what time it is. So, I figured someone up there might have seen someone out at my Jeep. So I went on to the inside of the jail and went up and got the jailer to go back with me, told him I wanted to ask those boys back there if they'd seen anyone out there. So we went on back and talked to two or three of them. And, no one had saw anything but Harvey Joe. He says, "I saw two people out there at your Jeep." And I said, "Would you care to describe them?" ***

[545] ***And he says, "Yeah, I'll describe them for you." And, which he did. Which, one that he described was myself, and the other was Michael Sergeant, which was working with me at the time at the jail. So...

GENERAL CROCKETT: All right, sir.

A. ...at this time, so I started to go back downstairs. And he says, "Hey," says, "I have something very important to tell him." And I says, "The sheriff can't talk to you without his parents (sic) and his lawyer (sic) here." I said, "It'd probably be tomorrow before he could talk to you. If it's something important enough I'm sure he would." He said, "Well, I'll tell you what it is." And I said, "Go ahead."

Q. And what did Harvey Gene Street tell you?

A. He says, "I know where the—or where a white truck is that has the clothes in it that came out of the Ben Tester house. And, also I know the man that owns it and where he lives, but I don't know his name."

[546] Q. Did he tell you whether there were any other people involved in the death of Ben Tester, the murder of Ben Tester?

A. He said there was one other subject involved, and that's all he said.

* * *

[State Rests.]

TESTIMONY OF KENNETH PROFFITT

[550] Direct Examination

By Mr. Stuart Hampton:

Q. Your name, please?

A. Kenneth Proffitt.

[551] Q. Ken, how old are you?

A. Nineteen (19).

Q. And, what do you do? Are you employed?

A. Unemployed.

Q. Where do you live?

A. Route 2, Hampton.

Q. Where is Route 2, Hampton?

A. Well, it's in the Braemar Community.

Q. And, Braemar, of course, is...

A. Part of Hampton.

Q. ...what you might call a part of Hampton, Tennessee?

A. Yeah.

Q. Do you remember back on August the 26th, 1981, when the homicide of Ben Tester occurred?

A. Yes, sir.

Q. Do you remember whether or not Joe Street came to your house?

A. Yes, he did.

Q. What time did he come by your house?

A. It was around 6:30 or 7:00. Somewheres in the community.

Q. And, was there anybody there at the house with **[552]** you.

A. Yes, my grandma, my brother and my cousin.

Q. And, your brother, where does he work?

A. He works in Michigan.

Q. And the other man that was there was you who?

A. My cousin. Jamie Barkley.

Q. And was he also from Michigan?

A. No, he's from up Stoney Creek.

Q. And, what were you doing when Joe came by your house?

A. I was sitting on the porch.

Q. And, did Joe say anything to you at that time?

A. Just asked me what I'd been doing.

Q. All right, what else did he say?

A. Asked me what I was going to do tonight.

Q. Who was with Joe?

A. Jeff Causby.

Q. What kind of—what kind of vehicle were they in?

A. Purple Chevrolet truck.

Q. And, did they want you to do anything with them?

A. Go riding around.

Q. Wanted you to go riding around with them?

[553] A. Yeah, a little while later.

Q. Did you—at that particular time did you to with them?

A. No, I told them to come back in just a little while 'cause I was going to stand there and talk to my cousin for a few minutes.

Q. And did you buy anything from them?

A. No.

Q. And, I take it then that Joe left you and—did you go to Austin Carden's for any purpose?

GENERAL BROWN: Object to leading, Your Honor.

THE COURT: Sustained.

A. Yeah.

MR. STUART HAMPTON: What did you go to Austin Carden's for?

GENERAL BROWN: Your Honor, would the Court instruct the witness that when an objection is sustained...

THE COURT: When—when I sustain an objection don't answer it.

A. Oh, okay.

MR. STUART HAMPTON: What did you do at Mr. Carden's?

[554] A. Bought some beer.

Q. And where did you go then?

A. To the Switch Back.

Q. Well, now, was that when Joe first came up to see you or later?

A. No, later.

Q. All right, so Joe left your company, and then came back later. Do you know what time that was?

A. He wasn't long.

Q. Well, was it 15 minutes, 30 minutes, an hour or what?

A. Maybe 20, 25...

Q. Sir?

A. ...20.

Q. About 20 minutes?

A. Yeah.

Q. And, what did you—when Joe came back the second time who was with him?

A. Just him and Jeff.

Q. Jeff who?

A. Causby.

Q. And, what did you all do then?

A. Well, we all got in the truck. Then we went—**[555]** came by the car wash, then we went through the bank and went straight to Austin's.

Q. Did you buy anything on the way? I thought you said a moment ago you had some beer.

THE COURT: Answer 'yes' or 'no'.

A. Huh?

MR. STUART HAMPTON: I thought a moment ago you said you had got some beer.

A. Yeah, but we didn't buy nothing until we stopped and we got some beer then.

Q. Okay. And then where did you go?

A. Straight to the Switch Back.

Q. Now, what is the Switch Back?

A. It's a curve on Dennis Cove. It's a turn back.

Q. On Dennis Cove, what?

A. Road, towards Dennis Cove Park.

Q. This Dennis Cove Road, it leads from Braemar to where?

A. You can—it goes to Butler, Buck Mountain, and Roan Mountain.

Q. Is this road a mountainous road?

A. Yeah.

Q. And is that the necessity of the Switch Back?

[556] A. Yeah.

Q. And, what did you all do at the Switch Back?

A. Well, we went up there just a little ways and turned around and parked right before the Switch Back and got out. Then drunk the beer.

Q. And, was there—while you all were—were there, was there anybody else there?

A. Yes.

Q. Do you know who they were?

A. Yes.

Q. What were their names?

A. Let's see, there was Lesley Snyder, Mathis, and a Potter, I don't know his first name.

Q. And, did you all have any conversation with them?

A. Yeah, we went down there to talk about five, ten minutes to them.

Q. Did you see any girls at that time?

A. None I remember.

Q. All right, when you left the Switch Back where did you go?

A. We went down through Braemar, then we seen Jeff Ramsey on Joe Vance's porch (unintelligible). We went **[557]** down to the bank. I asked to go get him. We turned around, and he was still sitting there talking to Joe's mom. We went up to the Nave's Trailer Park and turned around and come back, and he was walking down, and we got with him.

Q. Now, did you see anybody else at that time?

A. Nobody except for Joe Vance's mom.

Q. All right, and where did you go then?

A. We went down the road and we was going to shoot pool, and we went out to the pool hall.

Q. What pool hall?

A. Al's Arcade.

Q. And, before you went to the pool hall did you see anybody else?

A. Not I remember of.

Q. Do you know Tiny Bailey?

A. Oh, yeah, I remember now.

Q. All right.

A. That was before we got Jeff Ramsey.

Q. All right. Let's back up, then. When you went off the mountain, when you left the Switch Back, who did you see...

A. Tiny and Gary Street down at Crick's.

[558] Q. Down at where?

A. Down at—Crick's the only name I know of.

Q. Down at Greg's.

A. Crick's.

Q. Crick's.

A. I think she's a Crowe, her last name is.

Q. All right. And, did you have a conversation with Gary and —and Tiny Bailey?

A. Yeah, we—they got in the back of the truck. Jeff Ramsey wasn't with us then.

Q. And, where did you go?

A. We went to the high school and parked behind the baseball field.

Q. All right, and then the—how did they go—how did Tiny and Gary get to the—behind the high school?

A. In the back of the pickup truck.

Q. And, after that did you do anything with them?

A. Up at the high school, yes.

Q. You went to the high school?

A. Yeah, up at the high school.

Q. And, do you know what—about what time that was?

[559] A. It was before dark.

Q. And, did they—what did you do after you left Hampton High School? What did you do with the—the boys?

A. We took Gary Street and Tiny Bailey up to Gary's cousin's house.

Q. Now, where was that?

A. Right at the bottom of Dennis Cove.

Q. And then you left there and where did you go?

A. Then we got with Jeff Ransey. That's...

Q. And, where did you get with Jeff Ramsey?

A. Right below Mrs. Vance's house.

Q. And, did you ask him if you—were you going to do anything with Jeff?

A. yeah, we asked him if he wanted to do something, and he says—I asked him if he wanted to shoot some pool.

Q. Now, where were you planning to shoot this pool at?

A. We was planning to go to his house, but his mom... So we decided to go to Al's Arcade.

Q. Does he have a pool table at his house?

A. Yeah, in the basement.

[560] Q. And, you decided not to go there, and you went where?

A. Al's Arcade.

Q. And when you got there did you see anybody at Al's Arcade in particular?

A. I seen Al, 'cause we tried to talk to him.

Q. All right, now, who—you saw Al. Al, who?

A. I don't know his last name.

Q. What does he do?

A. He runs the pool hall.

Q. Did you have any conversation with him?

A. Yeah.

Q. Do you know what time that was?

A. It was just dusk.

Q. And, what did you—what did you do at the pool hall?

A. Well, I sat there and talked to him a few minutes, then I went in and I started playing pool.

Q. Who did you play pool with?

A. Let's see, with—me and Joe played some; me and Causby; me and Gary Farmer played some.

Q. All right, did you play anything else?

A. Some video games.

[561] Q. What did—was Joe there all the time?

A. Yes.

Q. What was he doing, besides shooting pool?

A. He was on the phone.

Q. All right. Do you know who he was talking to?

A. Yes.

Q. Did you talk with the—the persons that he was talking to?

A. Yeah, for just about half a minute.

Q. Who did you talk with?

A. Becky.

Q. Becky...

A. ...Hopson.

Q. ...Becky Hopson, and who else?

A. Well, Donna was on the phone, too, but I didn't talk to her.

Q. And, how long did you all stay at the pool hall, if you know?

A. About 25 'til 10:00.

Q. About 25 'til 10:00?

A. Uh-huh (affirmative).

Q. And then what happened?

A. We went up the road and—we went up on the **[562]** ridge and we started to buy somemore beer, and I didn't have my ID with me. And he wouldn't sell me none. Then I got my uncle to buy it. Then we went down, we was trying to find some place to drink it. We went to Jim Stout's residence, went to the creek.

Q. Where is the creek in relation to his house?

A. Well, his house is pretty close to the bottom of Dennis Cove.

Q. All right. And, how long were you at the creek, if you know?

A. About 15 minutes.

Q. And, was it daylight or dark?

A. Dark.

Q. And, what time did you leave the creek, if you know?

A. I'd say it was about 5 or 10 minutes 'til 10:00.

Q. Five or 10 minutes 'til 10:00 you left the...

A. Yeah.

Q. ...creek bank. And, who was with you at that time?

A. Me and Jeff Causby, Joe Street, and Jeff Ramsey.

Q. And, what did you do after you left the creek?

A. They took me straight home. I got there about **[563]** three or four minutes 'til 10:00.

Q. And, you did not see them anymore that night?

A. No.

Q. So, according to your testimony you saw Joe Street that night the first time approximately 7:00?

GENERAL BROWN: Object to leading, Your Honor.

THE COURT: Sustained.

MR. STUART HAMPTON: What is the first time you saw Jeff that night?

A. It was...

Q. Joe. What time did you first see Joe that night when he first came by your house?

A. Honest, I don't know. I just got back from Michigan and I hadn't seen a watch. I didn't even know what time I got back from Michigan.

Q. Well, was it daylight?

A. Yeah.

Q. Was it before or after supper?

A. After supper.

Q. What time did he pick you up the second time, do you know that?

A. About 20 minutes later.

Q. About 20 minutes. Do you know the time—that **[564]** time?

A. Like I say, I didn't look at a watch at all that day.

Q. All right. But you stayed with him from then until what time?

A. About five 'til 10:00.

Q. Was he in your company at all times during that period?

A. Yeah, except when I was playing video games. That's the only time he was out of my sight, and he was on the phone then. 'Cause I remember turning around after a video game, and he was on the phone.

* * *

[565] Cross-Examination

By General Brown:

* * *

[577] *** Q. So Jeff Causby and Joe Street came and they were in—in Jeff's blue pickup truck?

[578] A. That's correct.

Q. And you'd just come back from—from up North?

A. That's correct.

Q. Where had you been?

A. Warren, Michigan.

Q. You'd seen relatives up there?

A. Right.

Q. And Jeff Causby asked if you brought any drugs back with you from up North?

[Objection made and overruled.]

GENERAL BROWN: Jeff Causby asked you if you'd brought any—any drugs back with you from up North?

A. That's correct.

[579] Q. And you told him, yes, that—that you brought back some acid?

THE COURT: Answer 'yes' or 'no'.

A. Yes.

GENERAL BROWN: Now, by 'acid', you mean LSD?

THE COURT: Answer 'yes' or 'no' instead of...

A. That ain't.

GENERAL BROWN: What do you mean by 'acid'?

A. Well, you consider it that, I guess.

Q. It's not LSD but you consider it that?

A. No, I don't consider it that.

Q. What—what did you mean by 'acid'?

A. Purple microdot.

Q. It's an illegal narcotic, is that right?

A. Yes.

Q. So you sold Jeff Causby two hits of acid?

A. Right.

* * *

GENERAL BROWN: He paid you $6.00 for those two hits of acid?

A. That's correct.

[580] Q. And both Joe and Jeff asked you if you wanted to—to get drunk?

A. That's correct.

Q. So you went inside your house to get your shirt and some—and the acid?

A. Got it before I—and then I come back and I grabbed a shirt.

Q. I didn't understand you.

A. I said I gave it to them first, and then I—when I come back I grabbed my shirt.

Q. So you—you did go into your house?

A. That's correct.

Q. When you came back out Joe and Jeff said that they had to meet somebody downtown?

A. I did not say that, George made me say that. I said it, but it was placed in my mind. I sat there and talked about half a hour (sic).

Q. As a matter of fact, they said they had to meet somebody down at the Big K in town?

A. I didn't say nothing like that, I said I was going—I told them that I was going to sit there and talk to my cousin, come back in a little while.

Q. Again in your sworn statement, the third **[581]** paragraph: "They..." referring to Jeff Causby and Joe Street, "...said they would be gone for..." I'm sorry, the last sentence before that. "When I came back outside they..." you were referring to Jeff Causby and Joe Street, "...said they would be back in a little

while, that they had to meet someone downtown and drop by the house to get somemore money. They said they would be gone for an hour or longer." Jeff and Joe left and you went back on the porch.

A. I was told to say that. Told if I didn't change my statement I'd be in serious trouble.

Q. But you did make that statement, then...

A. After I was told that, yes.

Q. And, again, who told you that?

A. Couple of times George and that Rick fellow.

Q. The Rick fellow who was taking the statement, the fellow with the mustache, he told you you had to say that or you'd be in serious trouble?

A. He said I better change my statement or I'd be in serious trouble.

Q. But they didn't tell you what to say.

A. They sat there and talked, and they told me it'd be best.

[582] Q. They told you it'd be best if you told the truth, didn't they?

A. They says that statement is all wrong. Said there—there wasn't no way it could happen like that, and I know it did.

Q. And they never told you to tell the truth?

A. They told me I'd better change my statements.

Q. They—did they ever tell you to tell the truth?

A. Yes.

Q. They told you that over and over again, didn't they?

A. They was asking me questions, they'd give me an answer and I just agreed with them. They give me answers and I agreed with the answers.

Q. Now would you answer my question?

A. Yeah. Shoot it again.

Q. They told you over and over again to tell the truth, didn't they?

A. Yes.

* * *

[584] *** Q. Joe and Jeff did leave and were gone for a period of time?

A. For a little while.

Q. And you would guess about 20 minutes?

A. That's right.

Q. Then they came back, picked you up?

A. That's true.

Q. And you got in the...

A. The truck.

Q. ...in the truck, Jeff's blue pickup. What time was this?

A. I'd say around 7:30.

Q. You say they came back at—at 7:30?

A. Like I said, I didn't see a watch and I don't **[585]** know what time.

Q. Again, your sworn statement of January the 15th stated this was approximately 9:30 P.M.

A. I was told—they put that in my mind. They were saying, "It couldn't have happened." Or, they didn't put it in that way. They said if it happened at that time I had to be down there at the present time.

Q. What do you mean?

A. When they told me to say 9:30.

Q. I don't understand you.

A. I was talking about your question.

* * *

[589] *** Q. Up at the Switch Back a fellow came up in a Jeep?

A. He was already there.

Q. All right, who was there in the Jeep?

A. It's a Potter, Mathis, and a guy named Snyder was parked in front of me.

Q. You asked the guys in the Jeep if they wanted to smoke a joint?

A. Yes.

Q. You told them that it was some homegrown? Then **[590]** they decided they didn't want any of that?

A. That's true.

Q. But, Joe Street, the defendant here, spoke up at that point and said that he had some Columbian marijuana?

[Objection overruled]

GENERAL BROWN: Joe Street, the defendant here, spoke up about that time after the discussion about the homegrown, said he had some Columbian pot?

A. Yes.

Q. The boys in the Jeep told Joe to fire it up.
They didn't take none of it, though.

Q. Well, everybody smoked the pot.

A. I didn't say that.

Q. Well, you smoked pot up there?

A. Yes.

Q. And Joe smoked pot up there?

A. Yes.

Q. The boys in the Jeep smoked pot up there?

A. No.

Q. So just you and Joe?

[591] A. That I can remember.

Q. And Jeff Causby, too?

A. Yes.

Q. As a matter of fact, you did fire up some homegrown pot? Up there at the Switch Back?

A. Yes.

Q. And Joe tried it after he'd smoked the Columbian?

A. Yes.

Q. And it was too strong for him?

A. Yes.

Q. Then Joe gave the joint to Wesley?

A. I don't remember.

Q. After you'd been up there smoking pot and drinking beer for awhile you got back in the truck?

A. Right.

Q. And you and Joe and Jeff and these other boys drank the half case of beer that you'd gotten?

A. Right.

Q. When you got back in the truck you noticed that—that there was some clothes, green and white cloth material that you'd been sitting on when you rode up to the Switch Back that was gone?

[592] A. George raised cane on me for that. He got me scared and I said that. But there was no cloth in there. There were some old greasy rags that I tried to explain to him.

MR. STUART HAMPTON: May it please the Court, when Mr. Proffitt refers to 'George', let him refer to the full name.

THE COURT: All right, say the full name.

A. Mr. Papantoniou.

GENERAL BROWN: Isn't it true that the—the shirts—I'm sorry, that the cloth looked like shirts to you?

A. I know they was greasy, 'cause I had grease on my pants the next day.

Q. Would you answer the question?

MR. BILL HAMPTON: He just answered it, Your Honor.

THE COURT: Answer 'yes' or 'no' if you can.

A. I said they was greasy cloth. In the car.

Q. Did they look like shirts?

A. Not to me they didn't.

Q. So, in your statement, sworn on January the 15th, 1982, says as follows: "We got back in the truck. **[593]** I noticed that the green and white cloth material I had been sitting on when we came up the Switch Back was gone out of the truck seat. The cloth looked like shirts to me."

A. I said they did look like shirts. I didn't say they was, I said they could have been.

Q. But this is what you said in your statement in—back in January?

A. After George sat there about half a hour (sic), yeah.

Q. Well, which one's true?

A. We went up there, and it was shirts in there, but they was

greasy. Then when we went back down I didn't pay no attention if they was in there or not.

Q. Well, there was a whole bunch of shirts in there on the way up.

A. No, there wasn't.

Q. There were shirts in there.

A. They was cloth. I didn't know they were shirts. I didn't say they were shirts.

Q. Well just a moment ago—well, can—would you make up your mind?

A. I said they was cloth.

[594] Q. Well, a moment ago in here you said they were shirts.

A. I said they could have.

Q. Did you not two minutes ago tell me that they were shirts? But that they were greasy?

A. I said they was greasy material.

Q. Well, you rode in the bed of the truck up there?

A. No. Sat in the seat.

Q. In the seat.

A. In the middle.

Q. And where were these cloths or shirts or whatever you say they are?

A. They was in the middle when I sat.

Q. And you rode back the same place in the truck?

A. Yes.

Q. And they weren't there?

A. I don't remember.

Q. Well, they were in the way on the way up the Switch Back, weren't they?

A. Yeah, after I moved around a little bit they got comfortable.

Q. But you don't know whether—so you sat on them on the way up there?

[595] Q. Yes.

Q. But, today you can't say whether you sat on them on the way back down or not?

A. It's been a long time, it's hard to remember stuff like that.

* * *

[597] *** Q. Eugene Montgomery was at the pool hall, too?

A. I don't think he was.

Q. Well, think about it for a minute. Was Eugene Montgomery there or not?

[598] A. He was there a week—a week later, and I told George that.

Q. I'm not interested in a week later, was he there that night?

A. Nope.

Q. Your sworn statement of the 15th of January, I'll read it again: "Jeff got in the truck. We went to Al's Arcade. We," parenthesis, (Jeff, Joe, Jeff Ransey and I) got out of the truck. Eugene Montgomery and Gary Street were standing at the door."

A. No, they wasn't. 'Cause Gary was up at his cousin's. 'Cause we let him off at his cousin's house.

Q. So this—this is another part of your sworn statement of the 15th that's wrong?

A. Right, this—that was a different night.

Q. About the—about the third or fourth time that that statement that you made under oath is wrong?

THE COURT: Answer 'yes' or 'no'.

A. Yes.

GENERAL BROWN: Well, this isn't a very big pool hall?

A. No, it ain't.

Q. When you go in there you see everybody that's **[599]** there?

A. Right.

Q. Everybody that's there can see you?

A. That's right.

Q. So there's—there's, you know, it's just a little place with a few pool tables and electric games?

A. Right.

Q. As a matter of fact, you made a statement to Carter County Sheriff's Department even before the statement of January 15th. You gave one back in September the 11th, right after this happened?

A. That's right. But I was sick at the time.

Q. In that statement you say that, "At approximately 9:30 P.M. Eugene Montgomery and Gary Street came into the pool hall and went over to where we were playing pool, Jeff Causby and me."

A. Nope.

Q. So that's wrong?

A. Like I's saying, Eugene wasn't there. It was a week later. I tried to tell George that and he says I deliberately tried to change my story.

Q. So on September the 11th and January the 15th you say he was there and now you say he's not?

[600] A. That's right.

Q. What time was it that you got to the pool hall?

A. Right before dark.

• • •

[617] *** Q. Did you see Lester Rainbolt at the pool hall, too?

A. Yes.

Q. He was in there playing pool?

A. He was in there.

A. So both Lester Rainbolt and Gary Farmer were in the pool hall?

A. Yes.

Q. Were there for the whole period of time that you were there?

A. I know Gary was.

Q. Lester was there the whole time or most of it.

A. I didn't keep up with Lester.

• • •

[621] By Mr. Stuart Hampton:

MR. STUART HAMPTON: Mr. Proffit, how many times have you been taken down to the Carter County Jail for interrogation in connection with this homicide?

A. Seven or eight.

Q. And, at these—the times that you've been interrogated, have you—have they ever made any threats to you?

A. Yes, to lock me up.

[622] Q. How many times have they done that?

GENERAL CROCKETT: We would object to 'they'. If he can be more specific as to who we're talking about, want to find out.

MR. STUART HAMPTON: Each time you have given a statement have they threatened you?

GENERAL CROCKETT: We would object to 'they', Your Honor. Let's be more specific. 'They' is...

THE COURT: Could you be more specific, Mr. Hampton?

GENERAL CROCKETT: ...'they' is not a...

MR. STUART HAMPTON: When you gave the statement who would threaten—threaten you?

A. Well, the first one, nobody.

GENERAL BROWN: Object to it as being leading.

THE COURT: Objection overruled.

MR. STUART HAMPTON: Sir?

A. The first one, nobody, but the other ones they said if I didn't...

Q. Well, who's 'they'?

A. George and his—his deputies.

Q. George and his deputies.

A. Right. George told me one time, said if I **[623]** didn't get my stories twisted around to where it'd sound good, he said that I would be put in jail.

Q. Has he told you that more than—one occasion or more than one occasion?

A. More than one occasion.

• • •

TESTIMONY OF WESLEY SNYDER

[626] Direct Examination

By Mr. Stuart Hampton:

Q. You're Wesley Snyder?

A. Yes.

Q. Where do you live, Wesley?

A. Valley Forge.

Q. Where do you go to school?

A. I go to Hampton.

Q. Hampton High School?

A. Yes.

Q. Do you remember the evening of August 26th, 1981?

A. (Nods head yes.)

THE COURT: Answer yes or no, and when you do answer, answer loud enough for everyone in the courtroom to hear everything you say.

A. Yes.

Q. Course that was the evening that there was a homicide of Ben Tester?

A. Yes, sir.

Q. Do you remember on that date where you were in the evening of the 26th?

A. Between what time, sir?

Q. Well between six and eight P.M.

[627] A. I was at the Switch Back with my girl friend Shelia Blevins.

Q. All right. Now, while you were at the Switch Back did you see anyone else there at the Switch Back?

A. The other boys that I was talking to and...

Q. Who was the boys that you were talking to?

A. Greg Mathis and Ken—Greg Mathis and Potter, Ken Potter.

Q. Were you with those two boys?

A. Yeah, we was there together, you know...

Q. All right. Now, while you were there, did someone else come up on the Switch Back?

A. Joe Street, Kim Proffitt and Jeff Causby come up in a truck and parked about twenty or thirty yards behind us.

Q. Was Ken Potter there?

A. Kim Proffitt.

Q. And did you have any conversation with these boys?

A. They come down there around the back of the car and they stood around there and talked.

Q. Did you talk to them or...

A. Not in conversation.

Q. Did some of the other boys that were with you talk to them?

[628] A. They might have. I don't remember. I don't know if they did.

Q. Do you know what time of the evening that was?

A. Probably around six or seven, seven thirty—it was before dark, it was before dark.

Q. Sometime between six, seven and seven thirty.

A. Yeah, somewhere around there.

Q. You don't have a watch?

A. Huh uh (negative).

Q. You don't remember, but you do remember seeing them that night?

A. I remember in my statement that I give the time.

* * *

Cross-Examination

By General Crockett:

* * *

[632] *** Q. Did you then see Jeff Causby, Joe Street and Gary Street?

A. I know about Joe Street and Ken Proffitt and Jeff Causby, but I don't think Gary was there. I'm not for sure though.

A. You say Jeff—Joe Street was there...

A. Yes.

Q. ...and you say that Jeff Causby was there?

A. Yes.

Q. And who else was there?

A. Kenneth Proffitt.

Q. But Gary Street, you don't know whether he was there nor not?

A. No, sir.

Q. And they came up in a pick up truck—Chevrolet pick up truck?

A. Yes.

Q. That was dark in color? Was it dark or light color?

A. Seems like it was light, but I'm not really for sure.

Q. All right. Do you recall the color of it?

A. White.

Q. All right. And when this truck pulled up, was it dark **[633]** at that time?

A. No, sir, it was daylight.

Q. It was daylight. Did you see these—did you have any conversation with these three people then—Ken Proffitt the man who just testified, and Jeff Causby who is a co-defendant in this case, and Joe Street, who's on trial today?

A. We's talking and they stayed back in the truck for a long time, and then they come down and they started talking to both of us...

Q. When you say you were talking, who were you talking to at that time?

A. Kevin Potter.

Q. The boys on the motorcycle?

A. No, the ones that was there that we's talking to. See, they come down there out of the truck and I was talking to the boys on the motorcycles and they started to leave and got in the truck.

Q. Well did the boys on the motorcycles stay there, or did they leave?

A. They sat there in the road for just a couple of minutes and talked to me when they were leaving.

Q. Did all three of these young men come up to see you—Ken Proffitt, Jeff Causby and Joe Street?

[634] A. They stayed in their truck and then they come down there and started—they just stood around at the back of the truck like.

Q. Okay, they stood around the back of your truck. Did you get out of your truck and talk with them?

A. No, I was already out of my truck when they come.

Q. All right. What conversation did you have with them?

A. None that I can remember.

Q. Did they offer you any beer?

A. No, I don't think so.

Q. Did they offer you any pot, any marijuana?

A. No, sir.

Q. Did you smoke any with them?

A. No, sir.

Q. And if in their statements they say that you wanted to smoke some, is that correct or not?

A. No, not that I can remember of.

Q. All right. Did, did any of them ever leave you and go down over the mountain, or over the bank?

A. They left—me and Gregg Mathis and Kevin Potter was there—was only three there and they left going to the truck.

Q. They left in the truck?

A. Before we did, they went off the mountain.

* * *

TESTIMONY OF GREGG MATHIS

[638] Direct Examination

By Mr. Stuart Hampton:

Q. What is your name, Sir?

A. Gregg Mathis.

Q. And where do you live, Gregg?

A. Valley Forge.

Q. Are you a football player?

A. Yes, sir.

Q. And I guess pretty good too. Gregg, do you remember on the evening of August 26th, when the homicide of Ben Tester occurred?

A. Yeah.

Q. Now, what were you doing on—during the evening of August 26th

A. Well, I really don't remember everything. But I was just riding around, I guess.

Q. Do you remember being up on the Switch Back?

A. Yes, sir.

Q. Do you remember seeing anyone there?

A. Yes, sir.

Q. Who did you see?

A. I saw Wes Snyder, Kevin Potter—he was with me, Kim Proffitt, Joe Street and Jeff Causby and Gary Jenkins and Lynn **[639]** Estep.

Q. All right. Now, do you know—do you have a watch?

A. No.

Q. Do you know approximately what time you saw these boys up at Switch Back?

A. Well I thought and I don't know—sometime between seven and eight, I guess, give or take...

Q. Sometime between 7 o'clock and 8 P.M.?

A. Yeah, give or take, I don't know—sometime around there, but it wasn't dark—I'm sure of that.

MR. HAMPTON: All right, sir, you may ask him.

Cross Examination

By General Crockett:

Q. Gregg, do you fix the time that you saw Joe Street up on the mountain with—when he came up there with Kenneth Potter and Jeff Causby at what time?

A. It was between seven and eight, I guess—maybe even six thirty, I don't know, seven thirty, I don't know what time it was.

Q. Did you have conversation with them at that time?

A. Yeah, well...

Q. Did you see any evidence of pot smoking or beer drinking at that time?

[640] A. Well, I guess about everybody there was drinking some beer.

Q. Everybody there. Was Wesley...

A. Well, I don't know—I don't remember.

* * *

[647] *** Q. How long would it take to travel from—you know where Mr. Tester's body was found...

A. In, in the yard?

Q. Yes, sir. You know the home—you now know where that home is located?

A. Yeah.

Q. Behind Brown's Castle?

A. Sure do.

Q. How long would it take to drive from Switch Back to that home?

A. No time, maybe three, four minutes, five.

Q. Maybe four minutes?

A. Yeah.

* * *

[646] *** Q. Did you know Ben Tester?

A. I never knew Mr. Tester. I knew where...

Q. Do you know where the house is where he was hanged?

A. Right.

Q. Do you know how far it is from the Switch Back to that home?

A. A mile or less.

Q. Less than a mile, isn't it?

A. It probably is.

Q. In fact, you can stand on that Switch Back and see his home?

A. I—I don't know.

Q. That Switch Back looks right down on top of his—on top of Braemer, doesn't it?

A. Yes, you can see all over the place.

Q. You can see almost every home in Braemer?

A. Almost I guess, yeah.

* * *

TESTIMONY OF KEVIN POTTER

[648] Direct Examination

By Stuart Hampton:

Q. You are Kevin Proffitt?

A. Potter.

Q. Potter. Where do you live, Mr. Potter?

A. Valley Forge.

Q. How old are you?

A. Twenty-one.

• • •

Q. Mr. Potter, do you remember the evening of August 26th, 1981, when there was a homicide of Ben Tester?

A. Well, I remember some of it. I don't remember all of it.

Q. Do you remember where you were on the evening of August 26th?

A. Well, different places.

Q. Do you remember where you were between 6 and 9 o'clock **[649]** that day?

A. Well, I do know that I was on the mountain, Dennis Cove Mountain.

Q. Well, what time—do you know what time you were on Dennis Cove Mountain?

A. Around seven thirty or eight o'clock.

Q. Do you remember seeing any people there on the mountain?

A. Yes, yeah.

Q. Were you at the first Switch Back?

A. Yeah.

Q. Do you remember seeing—who do you remember seeing there at the Switch Back?

A. Well, me and Gary Mathis was together. I seen Wesley Snyder, Gary Jenkins, Lynn Estep, Joe Street, Kim Proffitt and uh...

Q. Did you see any Ramseys?

A. ...Jeff Causby.

Q. Did you see any Ramseys?

A. No.

Q. Now, what kind of vehicle were you in?

A. Jeep.

Q. Is that your jeep or some one else's jeep?

[650] A. Yeah, it's mine.

Q. What color is it?

A. Black.

Q. Do you remember any other cars being there?

A. Well Wesley was in his car?

Q. What kind of car did he have?

A. Orange El Camino.

Q. All right. Do you remember—were you there before Joe Street came up there?

A. No, we was sitting around talking, and they pulled in.

Q. Now, you say pulled in. Who pulled in?

A. Joe and Causby and Proffitt.

Q. All right. Were you in your vehicle or out of your vehicle?

A. I don't remember.

Q. After they pulled up and parked, where did they park in relation to your vehicle?

A. Well they, we was down at the lower part, and they pulled in—they went and turned around and pulled in up behind us.

Q. Now, did they get out of their vehicle?

A. Not right off.

Q. Did they later get out of their vehicle?

[651] A. Yeah.

Q. Did you have any conversation with any of those boys?

A. I believe I talked to Kim.

Q. Do you know what you talked about?

A. No, I couldn't—I couldn't tell you.

Q. Did Kim or anybody that was with him offer you any beer or any "pot"?

A. No, sir.

Q. How long were you there at the Switch Back?

A. Maybe fifteen or thirty minutes.

Q. And how long—when you left was Mr. Street, Joe Street still there?

A. No, they left 'fore we did.

Q. Do you know how long they were there on the Switch Back? Your best estimate.

A. Fifteen or thirty minutes.

Q. Fifteen or twenty minutes.

A. Thirty, fifteen or thirty.

Q. Fifteen or thirty minutes?

A. I couldn't really tell you.

MR. STUART HAMPTON: All right. General, you may ask him.

[652] Cross Examination

By General Crockett:

Q. What is your best estimate of the time that they left the mountain? I'm talking about Joe Street, Kenneth Proffitt and Jeff Causby?

A. Around seven thirty or eight. I couldn't really...

Q. Sometime between seven thirty and eight, they drove away?

A. Yeah.

Q. What kind of vehicle were they in?

A. They was in a truck.

Q. What kind?

A. Old model. I couldn't tell you what kind.

Q. Can you tell me what color?

A. No certain color. It was maybe primered, had an odd color, you know, just...

Q. Light or dark?

A. Light.

• • •

TESTIMONY OF TINY BAILEY

[656] Direct Examination

By Mr. Stuart Hampton:

Q. What is your name young man?

A. Tiny Bailey.

• • •

Q. Tiny, where do you live?

A. Elizabethton, Blevins Avenue.

Q. Blevins Avenue in Elizabethton. Back on August 26th, '81, last August, where did you live then?

A. Up in Nave's Trailer Park.

Q. Nave's Trailer Park, where?

A. Up Hampton.

• • •

[657] *** Q. Mr. Bailey, I asked you if last August you lived—where you lived, and you said Nave's Trailer Park, now where is Nave's Trailer Park?

A. Up at Hampton.

Q. Hampton, Tennessee?

A. Yes.

Q. And more specifically, it's in Braemar, Tennessee? Is that correct, sir?

A. Yeah.

Q. Now, do you remember the night of Ben Tester's homicide?

A. Yeah.

Q. That was August the 26th, 1981?

A. Yeah.

Q. Do you remember seeing Harvey Joe Street that evening?

[658] A. Yeah.

Q. Where did you see him?

A. It was up there in Braemer—him and Jeff Causby and Ken Proffitt, and me and Gary was going up to the ball field, up in Hamp—up in Hampton.

Q. Now, when you say him, who were you with?

A. Gary Street.

Q. And who was Joe Street with?

A. Ken Proffitt and Jeff Causby.

Q. Was there a vehicle involved?

A. Yeah a truck.

Q. Who's truck.

A. Jeff Causby's.

Q. Jeff Causby's truck?

A. Yeah.

Q. And did they stop and talk to you?

A. Yeah, they stopped.

Q. And did they pick you up?

A. Yeah.

Q. And where did they take you?

A. Up to the ball field up, up there in Hampton, high school.

Q. When you say the ball field, is that near something?

A. Up there at the high school.

Q. Near the high school?

A. Yeah.

[659] Q. And when you got there, what did you do? Did you get out of the truck? Were you in the truck?

A. Yeah, I was in the back of it.

Q. All right. When you got up there and they stopped the truck, I assume?

A. Yeah.

Q. And what happened next?

A. We got out and started talking.

Q. All right. Do you know or have any idea what time that was?

A. No, I don't—it's been so far back, I can't remember.

Q. Do you go to school somewhere, Tiny?

A. Yeah, I started, I go to Elizabethton High School.

Q. You go to Elizabethton High School?

A. Yeah.

Q. Now, on that day, did—or prior to that time, did you see Joe Street any place in Hampton or Braemer?

A. Just when they come by and picked us up.

Q. Did he ever ask you to do anything for him that day?

A. Huh uh (negative)

Q. Did he ever ask you to buy any rope for him that day?

A. Huh uh (negative)

Q. Did you in fact buy any rope for him that day?

A. Huh uh (negative)

MR. STUART HAMPTON: Your witness.

[660] Cross Examination

By General Crockett:

Q. Do you have any idea why he would make such a statement to the police, under oath, that you had made—that he had sent you to buy rope?

A. Huh uh (negative)

THE COURT: Answer yes or no, please.

Q. Sir?

A. No.

Q. Were you aware that he had made such a statement to the police?

A. Yeah.

Q. And this is the first time that you have come forward to make any statement in this case—it's been almost a year now?

A. Yes.

Q. All right, sir. So you deny buying this rope then?

THE COURT: Answer yes or no.

Q. Do you see this rope up here that was used to hand Ben Tester? Did you see that, sir?

A. I didn't see it, but I see it now though.

Q. This is the first time that you've seen such rope?

A. Except down at the police station when he showed us it then.

Q. What did you tell Sheriff Papantoniou then?

A. I'd never seen it.

[661] Q. You told him that you'd never seen it?

A. Yes.

Q. And you told him that you didn't know why the defendant in this case, Joe Street, would say that you'd seen it, did you?

A. I don't know why.

Q. You don't know why. Did you see Joe Street that day?

A. 'Cept, the only time I seen him was when he was up—when he come by and picked us up and took us up to the ball field.

Q. What time did he come by and pick you up that night?

A. I don't remember.

Q. Well, was it before or after dark?

A. It was before.

A. Before dark.

A. Yeah.

Q. Did you then go down to the car wash?

A. No.

Q. Do you know where the car wash is in Hampton?

A. Yeah.

Q. How far do you live from that?

A. Well then I lived a little—not too far from it.

Q. Within walking distance?

A. I'd have to walk about ten minutes.

Q. About ten minutes. Why did you get in this truck with these three other young men to ride down to the ball park—what was your purpose for going there?

A. Just to be going, I guess.

[662] Q. Well now let's get to it. The fact of the matter, the truth of the matter is that you went down there to smoke pot, didn't you?

A. Yeah.

* * *

Q. And when you went down there to smoke this marijuana with the defendant, how old were you?

A. Fifteen.

Q. You were fifteen—you're sixteen now?

A. Yeah.

Q. Did—how many joints did you fellows smoke down there **[663]** at the ball field?

A. Two.

Q. You smoked two. Everybody had two joints, or you just passed two around and everybody puffed on it?

A. Yeah, two.

Q. Just two joints between the four of you?

A. Yeah.

Q. Who were the four present?

A. It was me, Gary, Joe and Ken and Jeff.

Q. All right. Wait just a minute—let me back up. There was Ken Proffitt, there was Jeff Causby, there was Joe Street, there was you Mr. Bailey, and who else?

A. Gary Street.

Q. And Gary Street?

A. Yeah.

Q. What was the topic of conversation that night—what did you talk about?

A. I can't remember.

Q. You can't remember. How long did you stay there?

A. I can't remember that either.

Q. Where did you go when you left the ball field?

A. They took me and Gary up to Gregg Banner and let us off and he went home and I went home.

* * *

TESTIMONY OF MILAS ALLAN MILLER, JR.

[670] Direct Examination

By Stuart Hampton:

Q. Would you state your full name, please?

A. Milas Allan Miller, Jr.

Q. Are you commonly called Al Miller?

A. Yes, sir.

Q. Back in August of 1981, did you own a business in Hampton, Tennessee?

A. Yes, sir, I sure did.

Q. What kind of business did you own?

A. It was an arcade and pool hall combined.

Q. An arcade and pool hall combined?

A. Yes, sir.

Q. And what part of Hampton was that arcade and pool hall located?

A. Right off the four lane.

Q. Right off of the four lane?

A. Right across the street from the Ritter Town bridge.

Q. Is that in the section known as Ritter Town?

A. I don't think that section is. I think after you cross the bridge that's known as Ritter Town.

Q. All right. But you don't go across the bridge?

A. No.

[671] Q. Do you remember on August the 26th, the night of the homicide of Ben Tester?

A. Yes.

Q. The night of August 26th, 1981?

A. Yeah.

Q. Were you operating your business on that evening?

A. Yes, sir.

Q. Do you remember seeing Ken Proffitt at your business establishment?

A. I can remember seeing him. I don't know if that was the exact date. He comes and goes a lot. So I don't know exactly if he was up there or not—he probably was. Most people come in about every day.

Q. Do you remember Joe Street—do you know Joe Street?

A. Yes, sir.

Q. Do you know if he was there on that date?

A. Yes, sir, he was there.

Q. Do you remember Jeff Ransey as to whether he was at your pool hall on that date?

A. The guys like—Jeff and those guys, they come in occassionally. I didn't know those guys well. I'm not very sure if he was there or not.

Q. Do you remember talking with Ken Proffitt on that **[672]** evening?

A. I can't hardly say for sure if it was the same evening. I had talked with him several times. But as far as it being that evening, I'm not absolutely sure about that.

Q. Do you remember that—do you remember hearing about the homicide...

GENERAL BROWN: Object—never mind.

Q. ...do you remember hearing about the homicide of Ben Tester?

A. Yes, sir.

Q. When did you hear about that?

A. I believe it was the next day or the evening they found him—I believe it was later on that evening that someone come up there and told me.

Q. All right. Now, the day before, if you please—and I'm I'm not trying to get you to say something that you don't know—do you remember who was in your pool hall the evening before they found Ben Tester's body?

A. Well, earlier in the evening, I can remember the Adams boys were up there. I can remember Joe was up there. He come up there twice, I believe. I can remember several of the boys up there. They come in and out so often, it's kinda hard to keep track of them.

[673] Q. Well, the first time that you saw Joe on that evening do you know what time it was?

A. Well, he was up there of the day time, and I think he left and then come back.

Q. All right. Do you know when he came back—what time it was?

A. It was, it was daylight. It wasn't in the afternoon though—probably six or seven o'clock maybe.

Q. All right. What time was it in relation to whether it was dark or light?

A. It was light when he come up there.

Q. And do you know how long he stayed?

A. I would imagine two and a half—maybe three hours.

Q. And do you know what he did while he was at your establishment?

A. Shot pool mostly.

Q. Do you remember if he talked on the telephone to anyone?

A. Yes, sir. Yeah, he talked on the telephone.

Q. And you're sure that this was on the evening of the 26th?

A. Yes, sir.

Q. And it was sometime before dark?

[674] A. Yes, sir.

Q. Now, when he left, do you know whether he left after dark or not?

A. Yes, it was after dark.

Q. Do you have any idea as to what time he left?

A. Well, I would imagine between nine and nine thirty, maybe ten, because I stood on the porch and talked to him. It was pretty—it was pretty late.

Q. At the time you talked to him, was it dark?

A. Yes, sir.

* * *

TESTIMONY OF MIKE PUCKETT

[679] Direct Examination

By Mr. Stuart Hampton:

Q. Your name is Mike Puckett?

A. Yes, sir.

Q. Where do you live Mike?

A. Hampton.

Q. Hampton, Tennessee?

A. Yes.

Q. Other than a moment this afternoon, have you ever seen me before?

A. No, sir.

Q. Do you remember the night of the death of Ben Tester, August 26th, 1981?

A. Yes, sir.

Q. On that evening, where were you?

A. I was down at Al's Arcade, down at Hampton.

Q. While you were there, do you remember seeing Joe Street there?

A. As I was leaving.

Q. And do you know what time you were leaving?

A. About eight or two or three minutes after eight.

Q. Somewhere around 8 o'clock?

A. Yes, sir.

[680] Q. And you saw Joe come into the pool room?

A. Yes, sir.

Q. Do you know who he was with?

A. Jeff Causby and Ken Proffitt.

GENERAL BROWN: I couldn't hear him.

A. Jeff Causby and Ken Proffitt was with him.

Q. Do you know if he was with Jeff Ramsey?

A. I don't know.

Q. Did you see Jeff Ramsey there?

A. No, sir.

Q. Did you—do you remember anybody that you saw there at the pool hall that evening?

A. Gary Farmer and Lester Rainbolt and Al.

Q. They were there?

A. Yes, sir.

Q. Were they there when Joe came in?

A. Yes, sir.

MR. STUART HAMPTON: All right. You may ask him.

Cross Examination

By General Crockett:

Q. You have no idea how long they stayed there?

A. No, sir.

• • •

TESTIMONY OF DONNA HICKS

[681] Direct Examination

By Mr. Stuart Hampton:

Q. What is your name?

[682] A. Donna Hicks.

Q. Do you go to school, Donna?

A. I graduated.

Q. You graduated. Where did you graduate from?

A. Cloudland.

Q. When did you graduate?

A. May 23rd.

Q. This year?

A. This year, yeah.

Q. Do you know Joe Street?

A. Yeah.

Q. What was your relationship with Joe Street back in August of 1981?

A. We were close friends.

Q. Do you remember the homicide of Ben Tester which occurred on August 26th, 1981?

A. Yeah.

Q. In the evening of August 26th, 1981, did you talk to Joe Street?

A. Yeah.

Q. Where were you when you talked to him?

A. Becky Hopson's.

Q. Where is Becky Hopson's?

[683] A. Shell Creek.

Q. Where is Shell Creek, or what is the nearest other town...

A. Roan Mountain.

Q. And Roan Mountain is how far from Hampton, would you say?

A. About eighteen miles.

Q. And how did you happen to talk with Joe Street?

A. Becky called him.

Q. Becky—Becky who called him?

A. Hopson.

Q. How did she call him?

A. She called him at the pool hall from her house.

Q. Beg your pardon?

A. She called him from her house to Al's Arcade.

Q. Did she use the telephone, is that what you're trying to say?

A. Yeah.

Q. So while she was in Shell Creek, she called the pool hall at Hampton?

A. Yeah.

Q. And got Joe Street on the telephone?

A. Yeah.

[684] Q. And did you talk to Joe Street?

A. Yeah.

Q. Do you know what time it was when Becky called Joe Street at the pool hall?

A. Almost 8 o'clock.

Q. Almost 8 o'clock. Did you talk to Joe Street on the telephone?

A. Uh huh (affirmative).

Q. While he was at the pool hall?

A. Yes.

Q. On August the 26th, 1981?

A. Yes.

Q. What did you talk about?

A. Can't remember.

Q. How long did you talk to Joe Street?

A. About ten or fifteen minutes. And did anyone else talk to Joe Street on that telephone?

A. Becky.

Q. Becky. Do you know how long she talked to Joe Street on the telephone?

A. Well, she talked about ten or fifteen minutes, and then Joe said he had to shoot pool—it was his turn to shoot, **[685]** so he handed the phone to Kim Proffitt, and she talked to him 'til Joe come back to the phone, and that's when I talked to Joe. And then after I got done talking to him, she talked to him again.

Q. All right. Can you estimate to the jury, how long this conversation took place on the telephone with Joe and/or Kim Prof-

fitt,—over what period of time—let me see if I understand this—I don't want to lead you. But Becky called Joe, right?

A. Uh huh (affirmative).

Q. And she talked to him, and then who talked next?

A. She talked to Kim Proffitt.

Q. Talked to Kim Proffitt next, and then you talked to Joe?

A. Yeah.

Q. And then she talked to...

[686] *** A. Okay. She talked to Joe for about ten or fifteen minutes. Then Joe said he had—that it was his turn to shoot, so he gave the phone to Kim Proffitt, and she talked to Kim for—until Joe come back to the phone. Then she got back talking to Joe, and then I talked to Joe about ten or fifteen minutes. And then I talked to Mike Puckett, and I give the phone back to Becky and she talked for a while and then Becky's mama come in and told her it was almost 9:30 to get off the phone.

Q. So you talked to—you were on the phone then from about 8 until 9:30?

A. Yeah.

GENERAL BROWN: Object to leading, Your Honor.

THE COURT: Sustained.

Q. How long were you on the phone, from when to when?

A. From 8 until almost 9:30.

Q. You're sure about that?

A. Yeah.

Q. Have I ever talked to you before today?

A. No.

MR. STUART HAMPTON: You may ask her.

[687] Cross Examination

By General Crockett:

Q. Donna, what day of the week was this?

A. On Wednesday.

Q. On a Wednesday. And you called the pool hall I take it on a business phone?

A. Yes.

Q. And you stayed on that business phone you're saying or your or your friends did from 8 o'clock until 9:30, for an hour and a half?

A. Yeah.

Q. Constantly?

A. Uh huh (affirmative).

Q. And during part of that time—in fact, one of the last things that occurred, was that you talked to Mike Puckett that night?

A. Yes.

Q. He was—he was—right before you talked to him, or right after you talked to him, you hung up the phone?

A. No, I talked to Joe.

Q. Well you just—well according to the statement that you gave, you talked to Joe for ten or fifteen minutes, until Joe said it was time for him to play pool, is that correct? Is that a correct statement?

A. Yes.

[688] Q. "Then Becky talked to Kim Proffitt for a minute or two."

A. Yeah.

Q. That's correct? "And then Becky talked to Joe Street again for a few minutes."

A. Uh huh. (affirmative)

Q. That's true?

A. Yeah.

Q. "I talked to Joe for about ten or fifteen minutes", is that correct?

A. Yeah.

Q. "And then I talked to Mike Puckett for just a little while".

A. Uh huh. (affirmative)

Q. "Becky then got the phone back and told Joe bye".

A. Yeah.

Q. So that was the only conversation after Puckett, after you finished talking to Puckett?

A. Yes.

Q. Who just testified—who was here just a moment ago was to tell Joe bye and hang up the phone?

A. Uh huh. (affirmative)

Q. And if Joe—if Mike Puckett testified that he left at 8 o'clock, that would not be—that would conflict with what **[689]** you're saying that you were talking to him at 9:30 at the pool hall, wouldn't it? You're maintaining that you're talking to him an hour and a half later, after he said he had left the pool hall?

A. That's right.

Q. And you're certain about that?

A. I'm positive.

• • •

[690] ••• Q. What has been your interest in this, if you're not interested in Joe Street, or Becky is not interested in Joe Street?

MR. BILL HAMPTON: I don't think she understands, Your Honor.

Q. Why have you attended court in this case, if you have—if you or your friend have no interest in Joe Street?

A. We have an interest in Joe.

Q. He is—she has been to see him on how many occasions?

A. He's my third cousin.

Q. Mam?

A. Joe's my cousin.

Q. Joe is your cousin?

A. Uh huh. (affirmative)

Q. And she has dated Joe on occasion?

A. Yeah, they've been together, yeah.

Q. Mam?

A. They've been together.

Q. They've been together. And she has visited him on many occasions at the jail since he's been incarcerated?

A. Yeah.

Q. On dozens of occasions?

[691] A. I wouldn't say a dozen.

Q. How many would you say?

A. Three or four.

Q. Three or four times in the past year...

A. Uh huh. (affirmative)

Q. ...and you've been to court three or four times?

A. Uh huh. (affirmative)

Q. She is no relationship to him—she's not kin to him...

A. No.

Q. ...in any way? And Mike Puckett, of course is not related to any of you?

A. He's my first cousin.

* * *

TESTIMONY OF REBECCA ANN HOPSON

[691] Direct Examination

By Mr. Stuart Hampton:

Q. What is your name?

A. Rebecca Ann Hopson.

[692] Q. Rebecca Hopson?

A. Uh huh. (affirmative)

Q. Where do you live Rebecca?

A. Shell Creek.

Q. Is that above Roan Mountain?

A. Yeah.

Q. Something like eighteen, fifteen, eighteen or twenty miles from Hampton, Tennessee?

A. It's eighteen miles.

Q. Eighteen miles.

A. Uh huh (affirmative)

Q. How old are you?

A. Seventeen.

Q. Do you know Joe Street?

A. Yes.

Q. Do you remember on August the 26th, 1981 when the homicide of Ben Tester occurred?

A. Yes.

Q. On that evening, did you have occasion to talk to the defendant, Joe Street?

A. Yes.

Q. Now, speak up so these jurors can hear you. I don't know whether they're hearing you or not. You say you were in **[693]** Shell Creek?

A. Yes, I was at home.

Q. Well, where was Joe?

A. Al's Arcade.

Q. Al's Arcade?

A. Uh huh (affirmative)

Q. And where is that?

A. It's in Hampton.

Q. And how did you talk with him?

A. On the telephone.

Q. On the telephone.

A. Yes.

Q. Did he call you, or did you call him?

A. I called him.

Q. And do you know what time you called him?

A. It was around 8 o'clock.

Q. And how long did you talk with him?

A. Until almost 9:30, around 9:30.

Q. Did you talk with him continuously, or did you talk with someone else?

A. I talked to Kim Proffitt for just a couple of minutes, and Donna talked to him.

Q. Talked to who?

[694] A. Joe Street.

Q. Did she talk to Mike Puckett.

A. Yeah. She talked to Mike Puckett.

Q. All right. Now, when you finished the conversation, do you know what time it was, and if you do, how do you know?

A. It was almost 9:30, and my mom came in the bedroom and told me it was almost 9:30 to get off the phone, that she had to go to work the next morning.

MR. STUART HAMPTON: You may ask him—ask her, General. Have I ever talked to you concerning this case before, other than this afternoon?

A. No.

Q. And that was in the presence of about fifteen or twenty people, wasn't it?

A. Yes.

Q. This is the first time you ever told me that, isn't it?

A. Yes.

Cross Examination

By General Brown:

Q. You called Joe down at the pool hall?

A. Yeah.

Q. What day of the week was it?

[695] A. Wednesday.

Q. And you talked to him for just a few minutes?

A. I talked to him from around 8 o'clock until around 9:30.

Q. Okay. When you first called him?

A. Yeah, a few minutes, about twenty minutes.

Q. And then it was time for him to shoot pool?

A. Yeah, and then I talked to Kim Proffitt.

Q. And you talked to him for a couple of minutes?

A. Uh huh (affirmative).

Q. About five minutes?

A. No, about two.

Q. About two minutes...

A. ...all he had time to do was to ask me what I'd been doing.

Q. And then you talked to Joe for about another twenty minutes, after you talked to Kim?

A. A few minutes. I don't know how long, about twenty.

Q. It would be about twenty?

A. Yeah, I guess.

Q. Then Joe happened to Mention Mike Puckett?

A. Yeah.

Q. And you told Joe to say hello to Mike?

[696] A. Yes.

Q. And Donna Hicks, who was there, said that she wanted to talk to Mike Puckett?

A. Yes.

Q. And of course Donna did talk to Mike?

A. Yeah.

Q. So that was before Mike left the pool hall?

A. Yeah.

Q. And how long—how long did Donna talk to Mike?

A. She talked to Mike and Joe. I don't know how long she talked to Mike, a few minutes, I don't know.

Q. And then you say your mother came into the room?

A. I got the phone back and I talked to Joe, and then my mom came in and I got off the phone.

• • •

[697] *** Q. All right. Then give me the sequence of the last ten minutes of the phone conversation?

A. Okay. I talked to Joe for about the last ten minutes.

Q. What about the last twenty minutes?

A. I don't know. Donna talked to Mike, but I don't know when it was. It was just sometime during—between 8 and 9:30. I don't know what time she talked to him. I guess about 9 o'clock.

Q. So if Donna talked to him at 9 o'clock, he couldn't possibly have left the pool hall at 8 o'clock?

A. No, cause he was there. She talked to him.

Q. And if Mike had testified—Mike Puckett testified **[698]** that he left at 8 o'clock, he of course would be mistaken?

A. Yeah, cause we didn't call down there 'til 8 o'clock. We called down there at 8 o'clock, and I talked to Joe and then I talked to Kim and then I talked to Joe and then Donna talked to Mike and Joe and Mike was there.

TESTIMONY OF NAOMI CAUSBY

[706] Direct Examination

By Stuart Hampton:

Q. What is your name?

A. Naomi Causby.

• • •

Q. Mrs. Causby, are you—do you remember August the 26th, 1981 when the homicide of Ben Tester occurred in Carter County, Tennessee?

A. Yes, sir, I do.

Q. On the evening of August 26th, 1981, did you have someone visit your house?

A. Yes, I did.

Q. Who visited your house?

A. Joe Street.

Q. Do you know or have any idea what time Joe Street came to your house on that day?

A. I don't know the exact time. I know he ate supper with us, and I get off from work at four, and it is around five thirty or so when we eat supper.

Q. And was your husband doing anything that evening?

A. Yes, he was puttin (sic) the muffler on the car.

[707] Q. And when Joe came there, did he help your husband in any way or watch him doing anything?

A. Yes, he and Jeff were out in the yard helping him when I was fixing supper.

Q. Do you—do you know what time Joe Street left your house?

A. Yes, I do. He left around, about fifteen or twenty to eight.

Q. And in whose company was Joe when he left your house?

A. My son, Jeff.

Q. And what did he leave the house in—leave on foot or . . .

A. No, he left in a truck.

Q. What kind of a truck?

A. A Chevrolet, blue. I don't know what year—just a Chevrolet.

Q. Is it a—do you remember what year it is?

A. It's just an old truck that we carry garbage off in.

Q. Is it a real old truck?

A. Yes.

Q. And what color is that truck?

A. It's blue.

Q. And when did you next see Joe Street on that evening?

[708] A. It was around—I didn't see him at 10:15—I heard him and Jeff come in. I was in my bedroom. I usually go to bed around 10 o'clock, and I heard him and Jeff come in, and they wanted the truck to leave again, and my husband said no that they couldn't have it. And so they left and went to a neighbor's house.

Q. Now. Do you—did you overhear any instructions that your husband might have given Joe Street and your son when they first left in the truck at 7 or 8 o'clock?

A. Yes, he told Jeff that he had to have the truck back by ten.

Q. How do you know what time it was when Joe came back to your house?

A. 'Cause I usually go to bed around ten, and I was getting ready to go to bed and it had been about ten or fifteen minutes—my younger son goes to bed around nine, and I get ready about ten.

Q. Now, so you're saying that Joe—did you hear Joe when he came in?

A. Yeah, I heard them both.

Q. Did you recognize Joe's voice?

A. Yes.

Q. You said you didn't actually see him?

[709] A. No, but I know Joe's voice, and Jeff's.

Q. You've heard Joe's voice before and...

A. Oh, yes, plenty of times.

Q. ...recognize it?

A. Yes.

Q. And you say that when they came in that evening at 10:15 or so, did they do anything at the house, or did they immediately—immediately leave?

A. No, I think they were going to get something to eat, and my husband told them that they could get something there if they wanted it. But I don't know if they went in and got something or not—to eat in the kitchen.

Q. Now, did they leave your home then after ten o'clock, somewhere after ten o'clock?

A. Yes, sir.

Q. And do you know what time they returned to your home?

A. No, sir. My husband does—he was still up when they came back, but I had gone to bed and was asleep.

Q. You were in bed asleep?

A. Uh huh. (affirmative.) I know that they were there at 3 o'clock, because I got up and turned the tv off. They were asleep in the den.

Q. Now, you say they were asleep in the den. Now where **[710]** was Joe?

A. He was in the floor on the bean bag, and Jeff was on the couch, and the tv was still on, and I asked them if they wanted

to go to bed, and they didn't, and they just slept there.

Q. Alright now. You say you got up at 3 o'clock and cut the television off?

A. Yes.

Q. And when did you next see Joe Street?

A. About 6:30 when I got up.

Q. And do you get up regularly at 6:30?

A. Yes, I have to be at work at eight.

Q. Where are you employed.

A. I'm employed with the City School System at T. A. Dugger Junior High in Elizabethton.

Q. And what time did you leave to go to school?

A. I leave around fifteen til eight.

Q. And was Joe there at fifteen to eight that morning?

A. Yes, he was.

Q. Was he asleep or awake?

A. Yes, they were both asleep.

Q. When you left the house, you left them asleep at your house?

A. Yes, sir.

• • •

TESTIMONY OF MILLS CAUSBY

[715] Direct Examination

By Mr. Stuart Hampton:

Q. What is your name, Sir?

A. Mills Causby.

Q. Where do you live?

A. Up at Valley Forge.

Q. How far is that from Hampton, Tennessee?

A. It's about a mile.

Q. And where is it in relation to Elizabethton?

A. It's right out off the four lane, right off the four lane.

Q. In other words, it's between Elizabethton and Hampton, Tennessee?

A. Yes.

Q. Do you remember the night that Ben Tester was hung, August 26th, 1981?

A. Yes, sir.

Q. Did anyone come to your house in the evening August 26th, 1981?

A. Yes. sir.

Q. Who came to your house?

A. Joe Street.

Q. And what did he do after he got there? Well, what time **[716]** did he come to your house, if you know?

A. It was around six or six thirty, something like that.

Q. And what did he do when he came to your house?

A. Well, if I'm not mistaken he ate supper with us, and then they left about twenty minutes to eight.

Q. Did you do anything after supper which involved Joe Street?

A. Yes, we worked on the muffler on the car—muffler on my car.

Q. Your car?

A. Yeah.

Q. What kind of car is that?

A. A Datsun.

Q. Were you putting a muffler on or taking it off?

A. Putting it on.

Q. And what time did they leave your house?

A. About twenty to eight.

Q. And how did they leave your house?

A. In a blue pick up truck.

Q. What model?

A. '63 Chevrolet.

Q. A 1963 blue Chevrolet pick up truck?

A. Yes, sir.

[717] Q. And did you give any instructions to either your son or Joe Street as to what time they should return?

A. At ten o'clock.

Q. And do you know what time they returned to your house?

A. It was about ten or fifteen after ten.

Q. How do you know that that's the time that they returned?

A. I looked at my watch, and that's what time it was, you know, about fifteen after ten.

Q. Is that something that you do instinctively?

A. Yes.

Q. Particularly if you have a son or a daughter using a car?

A. Yes, sir.

Q. And when they came back, you say it was about ten fifteen?

A. Yes, sir.

Q. And what did they do, if anything, at your house?

A. Well they wanted the truck to go get something to eat out the road there 7-11 Store, and I said no Jeff you're not going to get it any more, I said it's parked for the night. And they went in the kitchen and they might ate a sandwich there. And they said they was going up on the hill to a friend's house up there.

[718] Q. Now, do you know to whose friend's house—do you know the name of the friend's house that they were to go to?

A. Betty Townsend—Betty Jones and Teresa Townsend.

Q. And how far is that from your home?

A. Uh, it's about like from here to that cafe over there.

• • •

Q. The most important part is what time did Joe Street come to your house that night?

A. It was about six or six thirty.

Q. And what time did they leave your house that night?

A. Twenty minutes to eight.

Q. And what time did they return to your house that night?

A. About ten fifteen.

[719] Q. And you said they wanted to go again . . .

A. To get something to eat out at the 7-11 Store, right out from the house.

Q. And you wouldn't let them?

A. That's right, yes sir.

Q. And did they go into the kitchen?

A. They went into the kitchen, and they might have ate a sandwich or something.

Q. But you don't know?

A. I don't know for sure.

Q. And what time did they leave your house?

A. Ten thirty.

Q. And they were going to Teresa—the home of Teresa Townsend's and her mother's?

A. Yes, sir.

Q. Were they in an automobile, or were they walking?

A. Walking when they left.

MR. STUART HAMPTON: All right. You may ask him, General.

Cross Examination

By General Crockett:

Q. Have you seen any indications, Mr. Causby, that your son —does he ever come in drunk, or pilled up—smoked— **[720]** smelling of—his mind smoked or fogged by pot smoking?

A. No, sir, he didn't show any signs of it, no sir.

Q. Has he ever—have you ever had any problem along those lines with him?

A. No, sir.

Q. All right. And he certainly was not on that occasion—your son, Jeff Causby, was not drunk or intoxicated that evening?

A. As far as I know, he wasn't, he wasn't.

Q. All right. And what about Joe Street?

A. The same as my son.

Q. There was nothing that would certainly affect his judgement or ability to do—to control his own actions?

A. That's right.

* * *

[723] *** Q. All right, sir. And do you know whether he stayed that night at the Townsend girls?

A. Until 1 o'clock.

Q. Do you know if he ever left the Townsend house?

A. No, not really.

* * *

[724] Redirect Examination

By Mr. Stuart Hampton:

Q. Let me ask you this, Sir—I think I forgot something. Do you know what time, after they went to Teresa Townsend's house, do you know what time they returned to your house from Teresa Townsend's house?

A. One o'clock in the morning.

Q. And after they got back to your house, do you know what they did?

A. Yeah, they went in there and laid down and cut the **[725]** tv on, and my wife got up about three o'clock and cut the tv off. They went to sleep, you know.

Q. Did you see them asleep in the den?

A. Yeah.

* * *

TESTIMONY OF BETTY JONES

[726] Direct Examination

By Stuart Hampton:

Q. Your name is Betty Jones?

A. Yes.

Q. Where do you live, Mrs. Jones?

A. Elizabethton, Route 8.

Q. Route 8, is that in Valley Forge?

A. Yes.

Q. Do you live in a mobile home there?

A. Yes.

Q. Do you remember the homicide of Ben Tester which occurred on August 26th, 1981?

A. Yes.

Q. On that evening, did you have — have any young men visit your mobile home?

A. Yes, Jeff Causby and Joe Street.

Q. What time did they come to your mobile home?

A. Between ten thirty and eleven.

Q. And was there anybody there when they got there, other than you?

A. Yes.

Q. Who?

A. Leroy Holtsclaw, (indiscernible) and Dick Ingram.

[727] Q. And what about your daughter, was she there?

A. Yes.

Q. What's her name?

A. Teresa Townsend.

Q. And when they got there, did they make any requests of anybody that was there?

A. They just wanted to go to the store.

Q. And what store did they want to go to? Do you know?

A. They said the beer store.

Q. All right. Was there anybody there that agreed to take them to the beer store?

A. Yes, Leroy.

Q. Leroy Holtsclaw?

A. Yes.

Q. And did they leave in the company of Leroy Holtsclaw?

A. Yes.

Q. How long were they gone?

A. About fifteen or twenty minutes.

Q. How long?

A. About fifteen or twenty minutes.

Q. And when they returned, did they have anything with them?

A. Yes, they had some Budweiser.

[728] Q. And how long did they stay at your home, after they came back?

A. About fifteen or ten to one.

Q. And when they left your home were they riding or on foot?

A. On foot. Leroy offered to give them a ride back down the hill, but they just walked, back to Jeff's house.

MR. STUART HAMPTON: All right. You may ask her.

Cross Examination

By General Crockett:

• • •

[730] • • • Q. Well they stayed there and drank beer at your house — is that what you're saying until 1:30 in the morning and got drunk?

A. No, it was ten or fifteen to one.

Q. Ten or fifteen to one. Did they get drunk?

A. No. They were drinking before they come up there.

Q. Were they drunk when they got there?

A. They were pretty high.

Q. Pretty high. And were they talking about anything?

A. Well, they said they had a joint before they come up there — smoked a joint.

Q. They smoked a joint. They didn't have any more joints there at your house, did they?

A. No.

Q. That's a joint of marijuana I take it you're talking about?

A. I guess that's what they meant.

• • •

[733] Redirect Examination

By Mr. Stuart Hampton

Q. Did anybody, any law enforcement agency, either the Sheriff's Department or T. B. I., ever attempt to talk with you in connection with this matter?

A. No, they didn't.

Q. Are you in any way related to Joe Street or Jeff Causby?

A. No.

TESTIMONY OF TERESA TOWNSEND

[734] Direct Examination

By Mr. Stuart Hampton:

Q. You're Teresa Townsend?

A. Yes.

Q. You're going to have to speak up a little bit 'cause this lady over here at the far end has got to hear you.

A. Yes.

Q. Now, this lady that just testified —

GENERAL CROCKETT: Betty Jones.

Q. . . . Betty Jones, is that your mother?

A. Yes.

Q. And where do you all live?

A. In Valley Forge.

Q. And do you live close to Jeff Causby?

A. Yes.

Q. Do you remember the night that Ben Tester was murdered, August 26th, 1981?

A. Yes.

Q. Did anyone come to visit your home on the evening of August 26th?

A. If it was on a Wednesday night.

Q. Beg your pardon?

A. If it was on that Wednesday night. I don't know what [735] day it was, but . . .

Q. I didn't hear you.

A. I don't know what day is was, but if that was the day that it was supposed to happen — on a Wednesday.

Q. But you didn't know about the murder of Ben Tester?

A. No, not until it was overwith and everything.

Q. Beg your pardon?

A. Not until it was over with and everything, you know.

Q. All right. In other words, a day or so after the murder of Ben Tester you heard about it?

A. Yes.

Q. And did you recall someone being at your house the night he was murdered, whatever night it was?

A. Yes.

Q. Who was at your house?

A. Joe Street and Jeff Causby.

Q. And do you have any idea what time they came to your house?

A. Well, I'd say it was about fifteen — about fifteen to eleven.

Q. About fifteen til eleven?

A. Yeah, around there.

Q. After they got there, how long did they stay, or [736] did they stay or go someplace else?

A. Well, they stayed there for about ten or fifteen minutes, and then my mom's boy friend took them down to the store and then they came back and . . .

Q. I'm afraid that these people can't hear you.

THE COURT: Speak up.

Q. They stayed there for ten or fifteen minutes and then your mother's boy friend took them where?

A. To the store.

• • •

Q. How long were they gone with your mother's boy friend?

A. I'd say about fifteen or twenty minutes.

Q. And they came back then to your house, the mobile home?

A. Yeah.

Q. And how long did they stay there after they came back?

A. Well, I only stayed up for about twenty minutes after they came back, and I went on to bed, and my mom said that they [737] stayed until about one o'clock.

Q. Do you know what time you went to bed?

A. No, I don't.

Q. Do you have any idea?

A. I'd say it was — it was close to twelve, I guess.

Q. And what were they doing when you went to bed? What was Joe Street doing when you went to bed?

A. They were up talking — just talking, and the tv was on.

Q. Were they watching anything?

A. I believe the tv was on, but I don't think they were watching.

Q. So they came to your house about ten thirty or quarter to eleven . . .

A. Yeah.

Q. . . .and as far as you know, you went to bed at 1 o'clock. .

A. I'd say it was around twelve.

Q. I mean twelve o'clock, excuse me. And they were still there?

A. Yeah.

Q. Did you hear them leave that night?

A. No.

* * *

TESTIMONY OF HARVEY JOE STREET

[751] Direct Examination

By Mr. Stuart Hampton:

Q. You are Harvey Joe Street?

[752] A. Yes, sir.

Q. Where do you live, Mr. Street?

A. Route 2, Hampton.

Q. And what community is that?

A. Braemar.

Q. And Braemar, is that part of Hampton, Tennessee?

A. Yes, sir.

Q. And do you remember the events that occurred on August 26th, 1981?

A. Yes, sir.

Q. Where were you in the early morning hours?

A. I was at home.

Q. And did anyone come to visit you at home?

A. Yes, sir.

Q. Who was that?

A. Glenida Peele and Clifford Peele.

Q. And when they came to your house, what were you doing?

A. I was in bed.

Q. Were you awake or asleep?

A. Asleep.

Q. And what was — what did they come there for?

A. They came looking for my brother, and he wasn't there.

Q. You heard the young lady testify that lives across the **[753]** street in front of you — I don't recall her name, on the stand the other day . . .

A. Yes, sir.

Q. . . . and she said that the Peele's had been there Monday, Tuesday, Wednesday and Thursday of that week. Is that true — is that a true statement or not?

A. I can't remember. I know they was up there Wednesday — Tuesday, I believe they's up there.

Q. Do you — do you have the habit of running around with the Peeles?

A. No, sir.

Q. You say that when they came to your house, they came to see your brother Gary?

A. Yes, sir.

Q. Was Gary there?

A. No.

Q. Had you ever run around with the Peeles before this date?

A. Maybe once.

Q. You say maybe once, when would that have been, that week, or the week before, or what?

A. It'd been about a month before.

Q. What did you do on that occasion with the Peeles?

[754] A. We rode around up on Stoney Creek and drunk some beer.

Q. Joe, after they got you out of bed, what did you do?

A. I went in there and sat down and started talking to 'em. They said where could we break into something to get some money, and I said I don't know.

Q. Did they have anything with them that they gave you, or shared with you?

A. We smoked some pot.

Q. And did you leave the house with them?

A. Yes, sir.

Q. Where did you go?

A. Ritter Town

Q. To whose home did you go?

A. Dave White's.

Q. And at whose suggestion did you go to Dave White's? Was it your suggestion, or someone else's suggestion?

A. Someone else's.

Q. Who — who suggested that?

A. Both Clifford and Glenida.

Q. Did they say that they — that they — did you know where you were going when you left the house?

A. No, sir, not 'til we got down around the car wash.

Q. And what did they say to you, if anything, at that time?

[755] A. They said we know where we can make some money, and we'll go up there now, and they went up to Dave White's house.

Q. Did you — course you went with them?

A. Yes, sir.

Q. Did you know what they were going to do?

A. No sir. I thought they was going to borrow some money.

Q. Did — did you know Dave White?

A. I'd heard of him. I didn't know him.

Q. And what did you do after you got up to White's?

A. Well I — I sat in the car and Glenida and Clifford went — Clifford went and broke into his garage, and Glenida was trying to get into his house.

Q. Did Glenida get into the house?

A. No, sir.

Q. What did you take out of the garage?

A. Let's see, Clifford took a drill and that skil-saw and extension cord.

Q. A drill, a what?

A. A skil-saw.

Q. And an extension cord?

A. Yes, sir.

Q. And what did you do with those items?

[756] A. We went to Kyle Campbell's and sold them.

Q. What is — who is Kyle Campbell?

A. He runs an antique store, down below Kyle Campbell's house.

Q. You say down below, are you talking about . . .

A. It's in the same building, but see Kyle Campbell's house is upstairs and the antique place is downstairs.

Q. Did you sell all of those things there?

A. Yes, sir.

Q. Was anything else removed from Kyle Campbell's (sic/White's)?

A. Yeah, Clifford Peele stole an extension cord.

Q. And what did you do with the — do after you left Campbell's?

A. We rode up around the lake.

Q. Did you attempt at that time to sell any of these items?

A. Yes, sir.

Q. Where did you attempt to sell those?

A. We went to Austin Carter's Beer Store and tried to sell the extension cord — Glenida did.

Q. And from — did she sell it there?

A. No, sir.

Q. What did you do after that?

[757] A. We went to the tire and recapping in Hampton, and I sold it for three dollars and fifty cents.

Q. You sold the extension cord?

A. Yes, sir.

Q. And after you sold the extension cord, what did you do?

A. I went up to the house and ate.

Q. You went back home?

A. Yes, sir.

Q. Had you not had breakfast that morning?

A. No, sir.

Q. Was there anybody at home that morning?

A. No, sir.

Q. Does your mother work?

A. Yes, sir.

Q. Where does she work?

A. Denise Lingerie, Johnson City.

Q. What about your father, was he there?

A. No.

Q. Where does he work?

A. The State Highway Department.

Q. Were any of your sisters there?

A. No, sir.

[758] Q. What did you have for breakfast?

A. I had an egg sandwich.

Q. Who fixed that sanwich?

A. I did.

Q. Did you make any telephone calls while you were at home?

A. No, sir.

Q. Do you know how long you were at home before anybody came back to your house?

A. About ten or fifteen minutes, and Glenida and Clifford came back.

Q. And did you have any conversation with Clifford Peele or Glenida at that time?

A. No, sir.

Q. Was the name of Ben Tester mentioned to you, or did you mention the name of Ben Tester to either Glenida or Clifford Peele?

A. No, sir.

Q. Did you leave with the Peeles?

A. Yes, sir.

Q. And where did you go on this occasion?

A. We rode up around the lake.

Q. Are you talking about Watauga Lake?

[759] A. Yes, sir.

Q. Is that — well is it Northeast or West of Hampton — but how far is the lake from your house?

A. Oh, about eight or nine miles, something like that.

Q. And in order to give the jury some idea of where the lake is, assume that they don't know it, if you went from Elizabethton to Hampton to the lake, then you go on to Mountain City, is that . . .

A. Yes, sir.

Q. So you were on this road to Watauga Lake?

A. Yes, sir.

Q. And what did you do at the lake?

A. Clifford Peele — we rode up past the house and he says there's a good place to break into . . .

Q. Whose house are we talking about?

A. Wally Isom.

Q. Do you know Mr. Isom?

A. No, sir.

Q. Why did he think it was a good place to break into?

A. Because it was down off the side of a bank.

Q. Did you go to Mr. Isom's house?

A. Yes, sir.

Q. And what did you do there?

[760] A. Clifford Peele knocked on the front door, and wasn't nobody answered — he went to the back door, and there wasn't nobody answered, and he saw a window open, and he got me to push him up into it.

Q. Alright, did he then go around and unlock the door for you to come in?

A. He went around and unlocked the door, but I didn't go in.

Q. What did you take out of the Isom house?

A. Some guns.

Q. Do you know how many guns?

A. I believe it was eleven (11) shotguns, and two (2) pistols.

Q. And what did you do with those shotguns and pistols?

A. Took them and sold them in Roan Mountain.

Q. And did you put them in the trunk?

A. Yeah.

Q. And was there a dog in this house?

A. Yes, sir.

Q. Well, after you got the guns, did you go directly to Roan Mountain, or did you stop at some place along the way?

A. I believe we went straight to Roan Mountain.

Q. You didn't stop and shoot the guns or anything?

[761] A. Yeah, Clifford stopped and shot the guns.

Q. Where 'bouts?

A. I don't know what part they call it. It's right next to the rifle range.

Q. Was it around the lake or . . .

A. Yeah.

Q. . . . some place else?

A. Yes, around the lake.

Q. Then after you shot the guns, you say you went to Roan Mountain?

A. Yes, sir.

Q. And to whose house did you go in Roan Mountain?

A. Donald Grant's.

Q. And did you go to — go up to see Mr. Grant?

A. Yes, sir.

Q. Talk with him?

A. Yes, sir.

Q. Was there anybody else there?

A. Maybe his wife, I ain't for sure.

Q. Well, other than his wife, was there anyone else there?

A. No, sir.

Q. Did you sell all of the guns to Mr. Grant, or part of them?

[762] A. All of 'em.

Q. All?

A. All, but one, I believe.

Q. How much money did you get for those guns?

A. I don't really know.

Q. Did he pay you the money, or pay Peele the money?

A. Paid both of us.

Q. You don't remember how much it was?

A. No, sir.

Q. After you left Donald Grant's house in Roan Mountain, where did you go next?

A. We went to a place called the Country Store and got some gas, some cigarettes.

Q. All right. Did you — where did you go next?

A. I went to Valley Forge.

Q. No, where 'bouts in Valley Forge did you go?

A. To the pool hall.

Q. Did you buy any beer between the — after you robbed the Isom house?

A. I was wantin (sic) to, but they wouldn't stop there and get any.

Q. So you went to the pool hall in Valley Forge?

A. Yes, sir.

[763] Q. And Valley Forge is the community that lays between Elizabethton and Hampton?

A. Yes, sir.

Q. And it's in the direction of Elizabethton, is that correct?

A. Yes, sir.

Q. And when you got to the pool hall in Valley Forge, was there anyone there?

A. They's some people sitting in a jeep.

Q. Do you know who they were?

A. I know Jeff Causby was there.

Q. Was he there?

A. Yes.

Q. Did you ask Jeff Causby to do anything for you?

A. I ask him if he could get a bag of pot.

Q. And did you give him any money?

A. Yeah, I gave him thirty-five dollars ($35.00).

Q. And after you gave him the money, what did Jeff Causby do?

A. He went to git (sic) it.

Q. And while he was gone to get the pot, what did you do?

A. Just sat around, and me and Peele talked — Clifford.

[764] Q. Was there at this time any conversation concerning Ben Tester?

A. No, sir.

Q. His residence?

A. No, sir.

Q. Or the robbery of Ben Tester's?

A. No, sir.

Q. You're sure about that?

A. Yes, sir.

Q. How long — how long before it was — how long did it take Jeff Causby to come back?

A. About thirty five or forty minutes.

Q. And was he successful in his venture?

A. Yes, sir.

Q. And he did bring the pot back to you?

A. Yes, sir.

Q. And what did you do with the pot?

A. Jeff split it up between me and Clifford.

Q. And what did you do next?

A. We went down to X Christmas Tree in Elizabethton.

Q. All right, now, before you went to the Christmas Tree, did you give Jeff any instructions?

A. I asked him what he was going to be doing tonight.

[765] Q. And what did he say?

A. He probably said stay at home, or down around the pool hall.

Q. Did you tell him anything that you'd do?

A. I told him that I'd come back and we'd go get drunk.

Q. All right. Then you left and went to — where did you say you went next? — To the Christmas Tree place?

A. Yes, sir.

Q. Is that at Lynn — Lynn Mountain?

A. I guess, I don't know.

Q. And is that in Elizabethton?

A. Yes, sir.

Q. Is it sorta of an isolated place?

A. Yes, sir.

Q. And what did you do there?

A. We smoked a couple of joints.

Q. All right. When you left the Christmas Tree Place, as you call it, where did you go then?

A. Up in town.

Q. Up in town?

A. Yes, sir.

Q. What were you looking for there in town?

A. Clifford Peele was wantin (sic) to sell some class **[766]** rings that he stole out of Wally Isom's house.

Q. And did you go to some particular place there in Elizabethton?

A. We went to some silver and gold place where they bought silver and gold.

Q. And did he — did the man buy the rings that you had for sale?

A. He was closed, and we went to a place up above it, and he told us where we could probably sell it at.

Q. Where did he tell you that he could sell it at?

A. A. A. Phillips.

Q. Is that a man that lives in Elizabethton?

A. Yes, sir.

Q. And do you know what street he lives on?

A. It's either "G" or "E" Street.

Q. And did he give you directions to this house?

A. Yes, sir.

Q. And did you go to the house?

A. Yes, sir.

Q. When you got to the house who went to talk to Mr. Phillips?

A. Clifford Peele.

Q. What did you do?

[767] A. I sat out in the car for awhile.

Q. And did you go — go in and talk to Mr. Phillips then?

A. I went in, but I didn't talk to him.

Q. Why did you go in?

A. To see what was taking Clifford Peele so long.

Q. And what was the problem — what did take him so long?

A. He didn't have no ID.

Q. And was the man demanding an ID of some sort?

A. Yeah.

Q. Did Mr. Peele use any sort of ID?

A. No, sir.

Q. Did the man buy the rings from him?

A. Yes, sir.

Q. Do you know how much money you got out of those?

A. I believe it was forty-two fifty (42.50).

Q. And after you sold the rings, where did you go?

A. To Long John Silvers.

Q. Long John Silvers, what sort of an establishment is that?

A. That's a restaurant like.

Q. What do they serve there, or sell there, what's their speciality?

A. Shrimp, fish.

[768] Q. All right. Did you eat there?

A. Yes, sir.

Q. And after you — or when you left Long John Silvers, where did you go?

A. Went back to Valley Forge Pool Hall.

Q. You way you went back to the Valley Forge Pool Hall, who took you there?

A. Clifford and Glenida Peele.

Q. And did they let you out there?

A. Yes, sir.

Q. Do you know what time it was?

A. No, sir.

Q. Well, was it early afternoon, or late afternoon?

A. About five thirty, six, something like that.

Q. Now, when they let you out at the Valley Forge Pool Hall, did Glenida Peele or Clifford Peele say anything about where they were going?

A. Said they was going to the go-cart races in Johnson City, and was wantin (sic) me to go.

Q. They wanted you to go?

A. Yes, sir.

Q. And what did you tell them?

A. I told them I was going up to Jeff's.

[769] Q. Well, it's a pretty good ways from the pool hall up to Jeff's house, isn't it?

A. Yeah.

Q. Why didn't you have them take you up there?

A. I didn't want them to know Jeff, cause they'd be down there aggravating him every day.

Q. So you elected to walk from the pool hall to Jeff Causby's house?

A. Yes, sir.

Q. Was there any plan between you and Glenida Peele or Clifford Peele to meet again that evening?

A. No, sir.

Q. Did you ever see Glenida Peele or Clifford Peele later on that evening?

A. Me and Jeff saw them when we was going toward Hampton, they was coming back from Hampton.

Q. So when they — when the Peeles let you out at the pool hall, what did you do?

A. Went to Jeff Causby's house.

Q. How did you get there?

A. I walked.

Q. And did you meet anyone at the — at the house?

A. Yeah, Jeff Causby's dad and his mom.

[770] Q. And do you remember what they were doing when you got there?

A. Jeff's dad and Jeff was fixin a muffler on the car.

Q. Now, you heard Mr. Causby yesterday say that he thought maybe you ate there at their house, did you eat at their house or not?

A. I believe I did.

Q. And after you ate, you did what?

A. We borrowed the . . .

Q. Well, did you do something else before you borrowed the truck?

A. Finished puttin (sic) the muffler on the car.

Q. All right, and that was there at the Causby residence?

A. Yeah.

Q. And did you and Jeff leave the Causby residence?

A. Yes, sir.

Q. What did you leave in?

A. A blue Chevrolet pick up.

Q. Do you know what year or model it was?

A. No, sir.

Q. Well, was it a new truck, or an old truck?

A. Old one.

Q. Was it a fairly old truck, or a real old truck?

[771] A. Real old truck.

Q. Was there instr — when you left in the truck, did you tell them where you were going?

A. Yes, sir.

Q. Where were you going?

A. To the Hampton pool hall.

Q. Was there any instructions given you about returning the truck?

A. Yeah, Mills Causby told us to have it back at ten o'clock.

Q. Alright. When you left the Causby residence what direction did you drive?

A. Up towards Hampton.

Q. Now is it — at this point did you say you saw someone?

A. Yeah.

Q. Who was that?

A. Saw Clifford and Glenida Peele, coming back from Hampton.

Q. In what direction were they headed?

A. Toward Elizabethton.

Q. Now, from that moment on, did you ever see Glenida Peele or Clifford Peele again that evening?

[772] A. No, sir.

Q. Now, where did you go? You said you were going towards Hampton when you left the Causby house, where did you go?

A. To Ken Proffitt's house.

Q. Was that the young man who testified here yesterday?

A. Yes, sir.

Q. And when you got there — got to his home, where was he?

A. I believe he was either settin (sic) on the front porch, or helping his brother work on a truck.

Q. And did you have any conversation with Ken Proffitt?

A. Yes.

Q. What — what was said?

A. I asked him what he was going to do later on, and he said probably stay around the house, watch tv.

Q. Did you ask him to go with you?

A. Yeah.

GENERAL BROWN: Object to leading, Your Honor.

THE COURT: Sustained.

Q. Did he leave with you at that time?

A. No, sir.

Q. Did he give you some instructions?

A. He told us to come back later.

[773] Q. All right. Where did you go when you left Ken Proffitt's house?

A. Me and Jeff Causby went up on the First Switch Back.

Q. When you were up on the Switch Back — do you know what time you got to the Switch Back?

A. No, sir.

Q. When you go to the Switch Back, did you see anyone else there?

A. No, sir.

Q. How long did you stay up on the Switch Back?

A. We went up there and turned around, amd smoked part of a joint, and went back down.

Q. And where did you go when you went back down?

A. To the pool hall.

Q. And how long did you stay there?

A. About five or ten minutes.

Q. And then what did you do?

A. Went back to Ken Proffitt's house.

Q. And during this sole time, from the time you left Causby's house 'til you went back to Ken Proffitt's house, who were you with?

A. Jeff Ramsey — I mean, Jeff Causby.

Q. When you got back to Ken Proffitt's house, what **[774]** happened then?

A. He got in the truck with us.

Q. Where did you go?

A. To Austin Carden's beer store.

Q. Is that just a — it's not a great distance from Ken's house — in fact that's how far from his house?

A. I don't really know.

Q. About as far as from here to across the street, or further?

A. About as here, about across the street there.

Q. And you bought some beer there?

A. Yes, sir.

Q. How much?

A. About a half a case of Bud.

Q. You bought twelve cans or bottles of Bud?

A. Yes, sir.

Q. And where did you go from there?

A. We went back on the Switch Back.

Q. Alright, when you got back up on the Switch Back was there anyone there? Did you meet anyone there?

A. Yes, sir.

[775] Q. Now, let me ask you this, in case I've lost the jury some place. When you got to the Switch Back, were you still in the same truck?

A. Yes, sir.

Q. The blue Chevrolet?

A. Yes, sir.

Q. And there was — there was you and who else with you?

A. The second time it was me, and Jeff Causby and Ken Proffitt.

Q. All right. When you got to the Switch Back or shortly thereafter, did you see any people at the Switch Back?

A. The second time?

Q. Yes, sir.

A. Yes, sir.

Q. And if you remember, tell us who you saw at the Switch Back?

A. Saw Greg Mathison, Kevin Potter, Wesley Snyder.

Q. Did you have any conversation with them?

A. We walked down there and stood around, and talked to 'em a little bit.

Q. Do you remember what you talked about?

A. No, sir.

Q. And do you know what time this was?

[776] A. No, sir.

Q. How long did you stay at the Switch Back?

A. About ten or fifteen minutes.

Q. And what did you do then?

A. We went back down off the mountain.

Q. As you went off the mountain, in what direction were you headed?

A. Toward the pool hall.

Q. Did you meet anybody on the way to the pool hall?

A. Yes, sir.

Q. Who did you meet?

A. I met my brother and Tiny Bailey.

Q. And you met your brother — what's his name?

A. Gary Street.

Q. And you were still in the blue truck?

A. Yes, sir.

Q. Did you — did you go any place, take them any place?

A. Yeah.

Q. Where — where did you take them?

A. We went to the Hampton High School baseball field.

Q. And what did you do there?

A. We smoked two joints and drunk some beer.

Q. What did you do next?

[777] A. We took my brother, Gary, and Tiny Bailey up to my cousin's house.

Q. Up to your cousin's house?

A. Yes, sir.

Q. Who is your cousin?

A. Gregg Banner.

Q. And where does he live?

A. At the foot of Dennis Cove.

Q. Was it on this side of the mountain, or the other side of the mountain?

A. Is that — it's in Braemer.

Q. It's in Braemer. Alright.

A. Yes.

Q. And you let them out?

A. Yes, sir.

Q. And then where did you go?

A. We turned around and went back down towards the pool hall, and saw Jeff Ramsey.

Q. Now, did you have a conversation with Jeff?

A. Yeah.

Q. What did you ask him, if anything?

A. We asked him if he wanted to go shoot some pool.

Q. When you're talking about did he want to go shoot some [778] pool, are you talking about at the pool hall or some place else?

A. To see if he wanted to go to his house and shoot some pool, and he said he couldn't because his mom and dad was in bed.

Q. And so you went to the pool hall?

A. Yes, sir.

Q. Do you know what time you got to the pool hall?

A. No.

Q. Was it dark — was is daylight or dark?

A. Dark.

Q. When you got there, what did you do?

A. We went in and shot a little pool and played some games.

Q. Did you receive a telephone call while you were at the pool hall?

A. Yes, sir.

Q. Who telephoned you?

A. Rebecca Hopson.

Q. And did you talk with her on the telephone?

A. Yes, sir.

Q. Who was that person — you said Becky, you talked to her, who else did you talk to?

[779] A. Donna Hicks.

Q. That was the two young ladies that were here yesterday?

A. Yes, sir.

Q. And when you left the pool hall, where did you go then?

A. We went back up in Braemer, up on the ridge to the beer store.

Q. Was it dark or daylight when you left the pool hall?

A. Dark.

Q. Do you know what time it was?

A. It was around 9:30 or 10 o'clock, something to ten.

Q. And you say you went — left the pool hall and, I didn't catch that?

A. To the beer store up on dividing ridge.

Q. And what did you get there?

A. We got an eight pack of beer.

Q. And where did you go then?

A. We went to Arson Long's Trailer Park to the creek bank.

Q. What did you do there?

A. We pulled in this boy's driveway that we knowed and asked him to see if he cared if we parked his truck, Jeff's truck there, and he said go ahead, and we walked to the creek bank.

[780] Q. And did you drink some beer there?

A. Yes, sir.

Q. And from there where did you go?

A. Took Ken Proffitt home.

Q. You took Ken Proffitt home?

A. Yes, sir.

Q. Did you take anybody else home?

A. We took Jeff Ramsey home.

Q. Now, when you left the pool hall, I take it then — when you left the pool hall who did you have with you?

A. I had, there was me, Jeff Causby and Ken Proffitt.

Q. So after you got through drinking the beer . . .

A. Oh, let's see, Jeff Ramsey was with us when we left the pool hall the second time.

Q. And you went up on the creek bank and drank some beer?

A. Yes, sir.

Q. Then what happened after that?

A. We took Ken Proffitt home.

Q. Did you take anybody else home?

A. Jeff Ramsey.

Q. Then what did you do?

A. Me and Jeff went back up to Valley Forge.

Q. When you went back to Valley Forge, to whose house did
[781] you go to?

A. Mills Causby.

Q. Was that the father of Jeff Causby?

A. Yes, sir.

Q. That's the fellow that testified here yesterday?

A. Yes, sir.

Q. What time did you get back to his house?

A. It was about ten, ten after ten, something like that.

Q. Did you do anything there at his house?

A. We ate a sandwich, I believe.

Q. And after you ate the sandwich, what did you do?

A. We went to Teresa Townsend's house.

Q. How did you get to Teresa Townsend's house?

A. We walked.

Q. When you got to Teresa Townsend's house, who was there?

A. Teresa Townsend, her mother, Dick Ingram and Leroy Holtsclaw.

Q. Did you ask either of these gentlemen to do anything for you?

A. Yes, sir.

Q. What did you ask them to do?

A. Asked them to take us to the store.

Q. Did they take you to the store?

[782] A. Yes, sir.

Q. After you went to the store, where did you go?

A. Back up to Teresa's house.

Q. Do you know how long you were gone?

A. About ten, fifteen minutes.

Q. When you got back to Teresa Townsend's house, was Jeff Causby with you?

A. Yes.

Q. And what did you — what did you do when you went back to Teresa's house?

A. Sat on the couch and talked a little while.

Q. How about television?

A. Yeah, the television was on, and we watched a little bit of hit (sic).

Q. Do you know what was on?

A. No, sir.

Q. How long did you stay at Teresa Townsend's house?

A. Stayed there until about one o'clock.

Q. What did you do next then?

A. We went back to Jeff Causby's house.

Q. How did you get to Jeff Causby's house?

A. We walked.

Q. When you got to Jeff's house, what did you do?

[783] A. We went in and laid down on, sat down on the sofa and turned on the tv.

Q. And what did you do then?

A. We went to sleep.

Q. After you got back to the Causby's residence some time after one o'clock, did you ever leave the house?

A. No, sir.

Q. Do you know what time you woke up the morning of the 27th?

A. It was about um 11:30 or 12 o'clock.

Q. Now, after this — after the 27th, or on the 27th or after the 27th, when did you first — when were you first questioned, if you know, by the Carter County Sheriff's Department?

A. Friday, I believe it was.

Q. In other words, the homicide occurred on Wednesday . . .

A. Yes, sir.

Q. . . . or and/or Wednesday and Thursday night, when did you first hear of the Ben Tester homicide?

A. It was either Thursday evening or Friday.

Q. And you say that the Carter County Sheriff's Department came Friday to see you?

A. Yes, sir.

[784] A. Yes, sir.

Q. What did they ask you to do?

A. Talk about that murder.

Q. Did they talk with you — where were you when they came to talk with you?

A. I was at the house. I'd just got back from Roan Mountain.

Q. Alright, did you talk with them there at the house?

A. No, sir.

Q. Do you know who the officers were?

A. No, sir.

Q. Did they make some request of you?

A. I believe one of 'em (sic) was Greer.

Q. Alright, did they take you to the Sheriff's Department?

A. Yes, sir.

Q. And do you know what time that was that they took you there?

A. No, sir.

Q. How long did you stay there?

A. About two or three hours.

Q. Alright, that was on Friday?

A. Yes, sir.

Q. Did they take you back home?

[785] A. I believe they put me in jail.

Q. Do you know how long they kept you there?

A. No, sir.

Q. Now, from that Friday until the 16th of September — excuse me — from that Friday, I believe that would the the 30th of

September, if I've got my dates right — until the 17th of September, when you allegedly made a statement to the Sheriff's Department implicating you in this homicide, how many times were you questioned by the Sheriff's Department?

A. About eight or nine times.

Q. And how would this — would they come up to your house and get you or what?

A. They'd either come to my house or my grandmother's house.

Q. And what time of day would they come and get you?

A. They'd come at night.

Q. Well, was it early night or late night?

A. Late.

Q. How long would they keep you there?

A. Three or four hours, sometimes longer.

Q. Sir?

A. Sometimes longer.

Q. Joe, to the best of your recollection, were you in jail on the 17th, when you made this alleged confession, or **[786]** were you at home?

A. I ain't for sure, but I believe I was in jail.

Q. And on that particular day prior to this alleged confession, did you have any conversation with — well, let me back up, I might have left out something — now, Joe, back and I'll try to get this in some sequence — course there was a juvenile petition against you in Juvenile Court wherein you were charged with being a delinquent child in that, on or about the 26th day of August, 1981, you together with Clifford Peele in breaking and entering into the residence of Wally — Wallace Isom, and . . .

A. Isom, yes sir.

Q. . . . and that petition was taken out, and you entered a plea of guilty to that . . .

A. Yes, sir.

Q. . . . and that was on the 31st day of August, 1981?

A. Yes, sir.

Q. And did the judge enter a sentence on that day?

A. He sentenced me to Pikeville.

Q. Well, the record speaks for itself, and actually he deferred any sentence . . .

GENERAL BROWN: Object to leading, Your Honor.

THE COURT: Sustained.

[787] A. He put it off, told me to come back a certain day.

Q. Told you to come back some other time?

A. Yes, sir.

Q. And he'd decide what to do with you?

A. Yes, sir.

* * *

Q. Now, let's get to the date of the alleged confession. You say that you — to the best of your recollection, you were in jail on the 17th?

A. Yes, sir.

Q. And did you have any conversation with the Sheriff of Carter County, George Papantoniou?

A. Yes, sir.

Q. On that particular date, did you have one or more conversations with him?

[788] A. What date was that?

Q. The 17th, September 17th?

A. More.

Q. And what were these conversations, what did they concern?

A. On one time he told me that if I didn't sign a confession to say I done it, that he was going to send me down the road the first thing in the morning.

Q. The first thing in the morning?

A. Yes, sir.

Q. At that time, did he read someone else's statement to you, concerning the Ben Tester murder case?

A. He read Clifford Peele's to me.

Q. And of course that statement of Clifford Peele's implicated you?

A. Yes, sir.

Q. Okay. And you say the Sheriff told you what now?

A. That he'd send me, if I didn't sign a confession that said I done it, that he'd send me down the road the first thing in the morning, and I wouldn't see my parents no more, for about ten or fifteen years.

Q. Do you — do you remember that evening of the 17th when Don Collins, the T. B. I. Agent, came there? On the 17th, **[789]** concerning your confession?

A. Not really.

Q. You don't remember when he came there?

A. No, sir.

Q. Well, you did see him there?

A. Yes, sir.

Q. Do you know approximately what time it was?

A. No, sir.

Q. He testified that when he came there that you were in the old jail, in the upstairs part in the Sheriff's Office?

A. Yes, sir.

* * *

Q. Mr. Collins came in who was in the room with you?

A. The Sheriff, George Papantoniou.

Q. Was anybody else in the room at that time?

A. No, sir.

Q. How long had you been in that room?

A. About an hour, hour and a half.

[790] Q. Had the Sheriff read you anything at that time?

A. Yes, sir, he read me Clifford Peele's statement.

Q. Did he go over it more than once with you?

A. Yes, sir.

Q. How many times . . .

A. I'd say . . .

Q. . . . if you know?

A. . . . three or four times.

Q. How would he — how would he state this to you? Is there any particular method he used?

A. He'd told me just to say the same thing similar to this. Then every time I'd say something different, he'd say hold it back up you're telling a damn lie.

Q. And did he make you any — course you've testified that he threatened to send you to Pikeville?

A. Yes, sir.

Q. Did he make you any promises if you gave a statement?

A. Yes, sir.

Q. What was his promise?

A. He told me I could go home. He said if I was put in jail that he'd put me out as a trustee.

Q. Course you realize that you'd already confessed to a burglary?

[791] A. Yes, sir.

Q. And they knew that they were going to do something with you about that?

GENERAL BROWN: Object to leading . . .

GENERAL CROCKETT: Again, he (interrupted)

MR. STUART HAMPTON: Did you — did you know that they were going to do something to you?

THE COURT: Sustained.

A. I — I though Judge Ray would send me to Pikeville.

Q. Alright. What was your state of emotion at this particular time?

A. I was scared, wanting to go home.

Q. When you say you were scared, were you really scared?

A. Yes, sir.

Q. Were you showing any emotion?

A. Yes, sir.

Q. What were you doing?

A. I was crying.

Q. Did your father come down?

A. For a few minutes.

Q. Did he stay there?

A. No, sir.

Q. What did he do?

[792] A. He signed a piece of paper, said he was my father, and left.

Q. Do you know if your mother was there?

A. I believe she was downstairs. I ain't for sure.

Q. Did you ask — at any time to see her?

A. Yes, sir.

Q. Were you allowed to see her?

A. No, sir.

Q. Did you at any time ask to see your — well, who was your attorney at this time?

A. Mr. Hampton.

Q. Is that me?

A. Yes, sir.

Q. At any time did you ask to see me on this evening?

A. Yes, sir.

Q. Who did you ask?

A. George Papantoniou.

Q. And what did he say in connection with . . .

A. He said no you don't need a lawyer.

Q. Did he say why you didn't need a lawyer?

A. He said it wouldn't help you any to have a lawyer.

Q. Now under these circumstances, did you or did you not agree to make a confession?

[793] A. Yes, sir.

Q. And according to the confession that's been introduced here — the confession started on 9:20 in the evening and lasted until 1 or 1:30 in the morning?

A. Yes, sir.

Q. How was this confession conducted — the method used, Joe?

A. I don't understand.

Q. Well, did you just sit down and start writing off what happened?

A. Yeah, and every time I'd say something different George would say hold it back up you're telling a damn lie.

Q. Well what do you say — well, when you say something different, what do you mean by that?

A. Something like he said — he put it a certain way that it happened, and I'd say something different, and he'd say you're telling a damn lie, then he'd read Peele's statement back and I'd say yeah that's right.

Q. Joe, didn't you realize that you were getting yourself in a hell of a lot of trouble by doing that?

A. I thought that they could go back to my witnesses and find out that I was telling a lie, and they'd drop — they couldn't charge me with first degree murder.

[794] Q. Who were your witnesses?

A. Jeff Causby, Jeff Ramsey, Ken Proffitt and a bunch down at the pool hall, and my brother and Tiny Bailey.

• • •

[795] • • • Q. Mr. Street, part of your confession, or alleged confession has to do with Tiny Bailey, the young man who testified here the other day . . .

A. Yes, sir.

Q. . . . is that part dealing with Tiny Bailey true?

A. No, sir.

Q. And why did you put that particular statement in?

A. I thought that they'd go question him and found out I was lying.

Q. And as a result of that, what?

A. What do you mean?

Q. Why did you lie? Why did you put Tiny Bailey in there?

A. Cause he was with me for a little while that night, and I knowed that I could use him for a witness if the Sheriff and them went and questioned him, they'd find out that I was telling a lie about it.

Q. And do what?

A. Would turn me loose.

[796] Q. All right. Now, I'd like to refer to this Exhibit Number 40, which was the written confession that Mr. Collins wrote down, and I'd like to turn to this — step right over here, — there's this statement in there, "that there was no conversation about meeting at the Big K, Cliff told me to be at the pool hall, so he could get hold of me to go to Ben Tester's." And then in this statement here; "Jeff Causby brought the pot back and Jeff put the pot between Cliff and I. We did not let Jeff Causby know about the plans of breaking into Ben Tester's. We did not tell Jeff Causby anything." All right, stand right there. When you came to the first part of this thing and made that statement to Agent Collins, what happened?

A. He jumped up and runned (sic) out of the room.

Q. Why did he jump up and run out of the room?

A. He said I was lying.

Q. And when he came back into the room — or when he was out of the room, who was there with you?

A. George Papantoniou.

Q. Now — now, Joe, after this alleged confession was made, what happened to you after that?

A. I got to go home.

Q. And was this deal for you to go home made before you gave this confession, or after you gave this confession?

[797] A. Before.

Q. Before you gave a confession?

A. Before.

Q. And you actually did go home?

A. Yes, sir.

* * *

Q. When were you — all right. When were you arrested in connection with the Ben Tester murder case? If you know?

[798] A. When I was charged with first degree murder?

Q. Yes, sir.

A. The 21st, I believe.

* * *

Q. Now, Joe, you've heard Mr. Colbough take the stand the other day . . .

A. Yes, sir.

Q. . . . and testify in this court . . .

A. Yes, sir.

Q. . . . on a conversation between you and the Sheriff and some other parties there on June the 27th, 1982?

A. Yes, sir.

Q. Where were you? Were you in jail or not?

A. Yes, sir.

Q. And had the other inmates in the jail been saying things to you?

GENERAL BROWN: Object to leading.

A. Yes.

THE COURT: Sustained.

[799] Q. What had they been saying to you?

A. They kept saying I was going to get the electric chair. They . . .

Q. What — what . . .

GENERAL CROCKETT: I'm sorry, I didn't understand that. I did not understand the last answer.

THE COURT: Answer the . . .

A. They kept saying I was going to get the electric chair.

Q. Can you tell me any more about it? If you walked down the hall what would happen in jail?

A. What do you mean?

Q. How did they communicate this business about the electric chair to you?

GENERAL CROCKETT: Your Honor, that — that is just leading and suggestive and . . .

Q. How did this . . .

THE COURT: I — I don't thing that's a leading question. The objection is overruled.

A. I was locked up with seven or eight people and they kept bugging me about it, saying I was going to get the electric chair — walking down that long hall to that chair.

Q. Did you on that — did you on June 27th, ask to see the Sheriff?

[800] A. Yes, sir.

Q. Were you allowed to see the Sheriff?

A. Yes, sir.

Q. How did you contact the Sheriff?

A. I told Donnie Shepherd I'd like to see him.

Q. And were you allowed to see the Sheriff?

A. Yes, sir.

Q. And who was there?

A. George Papantoniou, J. C. Henson and Bob Colbaugh.

Q. What did you ask him?

A. I asked the Sheriff, George Papantoniou, if I'd get the chair if they convict me of first degree murder.

Q. And what did he say to you, or what did he do?

A. He said yes you probably will. He said I'm going to ask for it, and he said I'll make sure that Glenida Peele does get the chair.

Q. And did he call anyone on the telephone?

A. Yes, sir.

Q. And who did he call?

A. Lynn Brown.

Q. And what conversation did — did the Sheriff talk to Lynn Brown on the telephone?

A. Yes, sir.

[801] Q. And did you talk to him on the telephone?

A. Yes, sir.

Q. Now, did they — did they show you anything there that night?

A. Yes, sir.

Q. What did they show you?

A. Larry Bobbitt's truck.

Q. Did they ask you any questions concerning the Bobbitt truck?

A. Yes, sir.

Q. What did they ask you?

A. They asked me, said, they said; "is that Larry Bobbitt's truck?

Q. And what did you say?

A. I said; "yes, sir, that's Larry Bobbitt's truck."

Q. Did they ask you anything else about the truck?

A. They asked me if there was any changes made on it.

Q. And what did you tell them?

A. I said yeah. The ass end of its been primered.

Q. Did you at that time implicate Kelly Banner in the homicide of Ben Tester?

A. No, sir.

Q. What was the conversation?

[802] A. George Papantoniou said; "you're afraid of Kelly Banner, ain't you"?, and I said; "No, I ain't got no reason to be afraid of my uncle," and he said; "well, Kelly Banner was there."

Q. Did you in any was — strike that. Was there any other conversation between you, the Sheriff, or Mr. Colbough, or of-

ficer Harrell, or Shepherd, or any other officers there? Was there any conversation between you and them concerning the homicide of Ben Tester?

A. George said; "Shelby Casey was in the driveway watching you, wasn't she?", and I said; "I don't know. I wasn't there."

Q. Did you make any admissions concerning the homicide of Ben Tester?

A. No, sir.

Q. Did you in any way involve yourself in that homicide that night?

A. No, sir.

Q. On the 27th, did George mention any other names to you?

A. Yes, sir.

Q. Whose name did he bring up?

A. Let's see, Kelly Banner, Donald Grant, Jeff Ramsey, [803] Kale Hazelwood and Shelby Casey.

Q. Did he in some way try to get you to implicate these people?

A. Yes, sir.

Q. Did you in fact implicate them in any way in the homicide of Ben Tester?

A. No, sir.

Q. Did you admit to anyone there, any one of these men that were there, Colbough or anyone else, that you put the rope around the neck of Ben Tester?

A. No, sir.

Q. Now, Joe, you're under oath here, and you requested me to put you on the stand . . .

A. Yes, sir.

Q. . . . in fact you demanded that I put you on the stand. Why?

A. Cause I don't really know, but I know I didn't do it.

Q. Did you in any way have anything to do with the death of Ben Tester on August the 26th, 1981?

A. No, sir.

Q. Do you — excuse me, do you recall the constable coming to the jail cell that testified here the other day, Ray Williams?

[804] A. Yes, sir.

Q. Did he in fact come to your jail cell as he said?

A. Yes, sir.

Q. Did he in fact ask you about the radio that was missing from his jeep?

A. Yes, sir.

Q. Where in this statement that Ray Williams gave? — Did you — course this was on November 23rd, 1981 — that's — do you remember what you said to Mr. Williams?

A. I told him who all I'd seen around the back end of his jeep.

Q. Did you state to him that you knew were some clothes were that came out of the home of Ben Tester?

A. No, sir.

Q. Did you tell him that you knew where a white truck was that was used in the homicide?

A. No, sir.

Q. Do you know of any reason why he would say that you did?

A. No, sir, not as I know of.

Q. Is there anything else that you'd like to say, Joe, that I haven't asked you?

A. Yeah. That ain't my statement. That's George **[805]** Papantaniou's statement.

Q. You mean the one on the 17th?

A. Yes, sir.

MR. STUART HAMPTON: All right. You may cross examine him.

Cross Examination

By General Crockett:

Q. Harvey Gene Joe Street, you are saying that in the hours of 9 o'clock, sometime around 9 o'clock until sometime on the 17th of September, 'til up in the early morning hours of the 18th of November (sic), in the presence of your father, Attorney General Lynn Brown, T. B. I. Agent Collins, that George, that George Papantaniou made a statement that was reduced to writing, that you read over that statement, and made certain corrections and additions to it, but it wasn't your statement, is that what you are now telling this Court and jury?

A. I didn't even get to read the statement.

Q. You're denying that you read the statement?

A. Right.

Q. Yeah, after they got done, they told me to go over it and told me where to put my initials.

Q. So Agent Collins just picked certain parts of this **[806]** statement and told you to put your initials there?

A. Yes, sir.

Q. You deny reading it?

A. Yes, sir.

Q. It was not read to you?

A. It might have been read to me.

Q. Well, was it read to you or wasn't it?

A. It might have been.

* * *

Q. And did you circle this portion and say this is not **[807]** true and put your initials on it again on a portion of page 3?

A. Yeah, they told me to put this is not true, and I did.

Q. All right. Did you tell the officers that that portion of your statement was not true when they read it to you?

A. I told them that portion was true, and they said no it is not true, you're telling a damn lie.

Q. So Agent Collins, a professional law enforcement officer, told you that you were telling a damn lie and . . .

A. No . . .

Q. . . . had you circle it and . . .

A. . . . no, George Papantaniou told me . . .

THE COURT: Let him finish, General.

MR. BILL HAMPTON: Let him finish.

A. . . . no, George Papantaniou told me it was a damn lie.

Q. And had you sign it. This was not as Agent Collins said, but you're saying that Sheriff Papantaniou did this and he did it in the presence of Lynn Brown and Sheriff Papantaniou?

A. No, Lynn Brown wasn't there. He walked out of the room about six or seven times.

Q. And what about your father?

A. My dad came in — he signed a piece of paper and said he was my father, and left.

[808] Q. So if his testimony was that he was there, he's wrong too?

A. No, my dad ain't wrong.

Q. And Agent Collins is wrong?

A. Yes.

Q. And of course Ray Williams when he says you confessed to him is wrong?

A. Yeah.

• • •

Q. Did — and then Officer Bob Colbough he's also wrong? He fabricated that statement?

A. Yes.

Q. Alright sir. So we have at least three professional police officers, or — three officers and a judicial commissioner, all of whom have testified falsely here today?

[Objection made and overruled.]

[810] Q. So Agent Collins is wrong?

A. Yes.

Q. Ray Williams is — Constable Ray Williams is wrong, who . . .

A. Yes, sir.

Q. . . . when he testified that you made a statement on another occasion?

A. Yes.

Q. Officer Bob Colbough is wrong? Judicial Commissioner is wrong when he says that you named this truck, and said there sits the truck that we hung Ben Tester from? He's wrong about that?

A. They asked me to see if that was Larry Bobbitt's truck, and I said yeah that's Larry Bobbitt's truck.

Q. Well, let's go back to this statement. We're — we're going to come to all these statements, and we want you to explain how they are wrong, sir. So on page 3, which bears your initials on at least three places, and is circled, the circling of two paragraphs, which says; "this is not true," did you do that?

A. Yeah, after the Sheriff George Papantaniou told me to.

Q. After the Sheriff told you to, in the presence of **[811]** Officer Don Collins?

A. Yes, sir.

Q. All right sir. And you initialed — how — who showed you what to circle?

A. Don Collins.

Q. On the page 4, did you read page 4 of your statement?

A. No.

Q. Was it read to you?

A. Well I guess it was.

Q. Why did you place your initials at three, four different places on that page?

A. Well, they told me to initial it.

Q. Who told you to initial it?

A. Don Collins and George Papantaniou told me to initial it every one of them pieces of paper.

Q. Was Mr. Brown present at that time also?

A. No, sir, I don't believe he was.

Q. You don't think he was present when that was taken, and you father wasn't present?

A. That's right.

Q. Do you know why your father left?

A. I believe he was a drinking that night.

Q. You think your father was drinking. What about your **[812]** mother?

A. She was downstairs. I asked for her to come up and George said no. He said your mama makes you back out of everything that you do.

Q. Did you always want your mother to be with you when you made your statement?

A. Yes.

Q. You always requested the presence of your mother . . .

A. I got to seen (sic) her one time down there.

Q. You never at any time during the taking of any of these statements did not want your mother to be present?

A. I wanted my mother to be present at all times and he said no your mama makes you back out of everything. Your mama is not allowed up here.

Q. We'll just stop on this statement, and we'll come back to it in just a moment. Do you recall making a statement at the hospital one time with your father one time on September 11th, about four or five days before you confessed to the Sheriff?

A. Yes, sir.

Q. Do you remember making a statement — did you tell the same thing in this statement that you told here today?

A. No, sir.

Q. You told a different version, didn't you?

[813] A. Yes, sir.

Q. The first in which you indicated that you knew about this hanging, but you were not a participant in it?

A. I didn't know about it, but I said that. The Sheriff told me

to say it, says you can go home, says when you get done with this, you can go home, and you even agreed to it.

Q. And that's — at that time you admitted in my presence and the presence of your father, and the presence of the Juvenile Judge and the presence of the Sheriff, and a — I believe Officer Morrell was there — you admitted having conversations in knowing that Ben Tester was going to be hung, didn't you?

A. Yes.

Q. And you're now saying that that wasn't true?

A. That's right.

Q. You lied on that occasion?

A. That's right. I wanted to go home.

Q. You were wanting to go home. Well, you weren't in jail then. Hadn't you come voluntarily to the Sheriff's Department to talk to him?

A. No, no, they came up there at the house and got me.

Q. How many times did you voluntarily come to the Sheriff's Office to talk to him?

A. I didn't voluntarily come none. They always brought **[814]** me down.

Q. Have you ever had trouble talking to — didn't you tell us on that occasion that you didn't want to talk in front of your mom?

A. No, sir. I asked for my mom. George said you can't have your mom, said every time you get around her you start backing out of everything.

Q. Do you remember saying in response a question what — "that I just told the truth, I told everything I know to them" . . .

MR. STUART HAMPTON: If you're reading from something, I'd like to see it — I . . .

GENERAL CROCKETT: I assume you have it, Mr. Hampton. We've given you everything that we've had — on page 35, the statement was taken on the 11th of September, 1981. "I've told everything I knowed about them. I didn't want to say it last night. I'm sorry about that. You can get the other man up there, Mr. Brown, I didn't say nothing. I just couldn't say it in front of my mom."

A. I, I tell my mom the truth. I lie in front of my dad and tell my mom the truth.

* * *

[815] * * * Q. Well, let's start off and I want to still come back to your statement — to your confession. Do you remember the first statement you made two days — two days after the death of Ben Tester, after he was murdered on the 26th — you made a statement on the 28th — do you remember that?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. Do you remember talking to Officer Morrell and Officer Collins?

[816] A. I talked to Collins so many different times, he'd come and question me.

Q. Alright sir. Do you remember making a statement you were with Clifford Peele that morning. You got up and you went to the pool hall with him?

A. The pool hall was closed. It don't open 'til around twelve.

Q. So that was a lie when you told the officer that, didn't you?

A. I told them that Clifford Peele came up to the house, yeah, and got me out of bed.

Q. "We sat in the house and listened to the stereo" . . .

A. Yeah.

Q. . . ."from my house we went directly to the pool hall up in Hampton."

A. The pool hall don't open 'til twelve, either twelve o'clock or two o'clock the pool hall opens.

Q. So two days after this happened — two days after the murder, in fact the day after Ben Tester's body was found — a little over twenty four hours after his body was found, you were already telling the officers falsehoods? The first officers that talked to you, you told them something that wasn't true? The first words out of your mouth were falsehoods, it that not **[817]** correct?

A. Do what? What about that two days?

Q. Twenty four hours — twenty four hours, it was a little over twenty four hours after the body of Ben Tester was found, the officers started to question you, and the first thing that you told them well I'd gone to some pool hall with Clifford Peele?

A. That was — let's see . . .

Q. And you told them that that happened at 8 o'clock in the morning?

A. Clifford Peele came and got me up out of bed at eight o'clock in the morning, him and Glenida.

Q. Did you tell them that; "from my house we went directly to the pool hall in Hampton, located in the old Guires Building, and we arived at the pool hall at eight o'clock . . .

A. I told them that we went to Ritter Town.

Q. . . . or at nine o'clock, I guess it is.

A. No, I toid them we went to Ritter Town.

Q. "And Clifford Peele and I shot two games of pool while

Glenida waited outside." That's the first statement you made concerning your whereabouts on the 26th of August?

A. We went to Ritter Town after we left my house.

Q. So that's what you — that's what these officers wrote **[818]** down, then these officer also have written down a falsehood about it?

A. I guess they have.

Q. All right. So Officers Morrell and Collins are also wrong, and we can add them to your list of people who have testified and made up stories about you?

A. Yeah.

Q. Okay.

A. When I was down there — when they started questioning me Friday, George Papantaniou he said this will get me put back as Sheriff, and he said . . .

Q. Get you put back in the chair?

A. Was going to get him put back in as Sheriff, he said you're going to say that you done it, or you're going to sent down the road the first thing in the morning. He said you won't ever see your parents no more. He said you'll be an old man before you get out.

Q. The very first day that you were picked up, Sheriff told you that it was going to put him back in as Sheriff and you were going to be an old man before you saw your parents again

A. That's right.

* * *

[820] *** Q. Do you recall telling the officers that Clifford Peele owns a 1979 or '80 Chevrolet El Camino, gray in color with black stripes and it was in this vehicle that the three of us went

to the pool hall and also the vehicle we left in. Clifford, Glenida and I left the pool hall at 9:40 or 10 o'clock?

A. The Sheriff told me it was a El Camino 1979 El Camino.

Q. So this is all the Sheriff's statement? This is not your statement? You didn't say anything at all like that?

A. What do you mean?

Q. You didn't say that you had gone to the pool hall? You didn't say that it was . . .

A. That's right. I told him I went to Ritter Town after I left the house.

Q. "From the pool hall, the three of us went back to my **[821]** residence where I ate some breakfast."

A. No, from Ritter Town, we went and sold that skil saw and drill and extension cord . . .

Q. In other words, what your version of it now is . . .

A. . . . then we went to Issac Carden's beer store and tried to sell the extension cord, and we couldn't sell it there, so we went to the tire and recapping and sold it for three dollars and fifty cents, and then I went to the house and ate.

Q. Was your attorney present when you made the first statement to the officers?

A. No, George said I didn't need no attorney . . .

Q. Why did . . .

A. . . . he said it wouldn't do me no good to have an attorney.

* * *

[829] * * * Q. Alright then, let me take it sentence by sentence. "On August 26th, 1981 Clifford and Glenida Peele came to my residence in Hampton."

A. That's right.

Q. "This was approximately at 8 to 8:30."

A. Yeah.

Q. "Clifford and Glenida and me sat in the house and listened to the stereo, and we did that for fifteen minutes while I was washing my hair."

A. I didn't wash my hair that morning.

Q. Alright, so that's a false statement?

A. That's right.

Q. "From my house we went directly to the pool hall in Hampton, Tennessee, located in the old Dyer's market building. We arrived at the pool hall at 9 o'clock. Clifford Peele and I shot two games of pool while Glenida waited outside the pool hall?"

[830] A. That's a lie.

Q. "Clifford owned a 1979 or '80 Chevy El Camino, gray in color, with black stripes across the doors."

A. I know that they own a El Camino gray and black.

Q. How did you know that, sir?

A. I rode around in it Wednesday.

Q. Did you make that statement?

A. I can't remember if I did or not.

Q. "This is the vehicle that the three of us went to the pool hall in, and is also the vehicle that we left in."

A. That's a lie.

Q. That's a lie. Alright. "Clifford and Glenida and I went to the pool hall for approximately — at approximately 9:45 — left the pool hall at approximately 9:45 to 10 o'clock."

A. That's a lie.

Q. "From the pool hall the three of us went back to my residence, where I ate some breakfast. This was approximately 10:05."

A. Now, read that again.

Q. "From the pool hall the three of us went to my residence, where I ate some breakfast. This was approximately 10:05."

A. I didn't leave no pool hall and go eat no breakfast.

Q. So that's a lie?

[831] A. Yeah.

Q. "Clifford and Glenida Peele had left by this time, and they'd stayed only long enough to let me out at my house." I take it that's a lie?

A. Guess it is.

Q. And then it says that this statement was discontinued upon the advice of defendant's attorney, Stuart Hampton. Mr. Hampton was there?

A. I can't remember. I don't believe he was. I don't know.

* * *

[838] * * * Q. You did in this statement — the statement that you made on the 17th, didn't you admit to being with Clifford Peele when you broke into the White residence and stole an extension cord and an electric saw . . .

A. I, I was accessory. I didn't . . .

Q. Were you present with — or did you go with him, after you say you waited in the car while he broke into the tool shed, and you . . .

A. Can I ask you something?

Q. No sir, you can't ask anything. I'm asking . . .

A. That's what I thought.

Q. . . . you the questions and you can answer those, if you can.

A. I was there when Peele broke into the big house, yeah.

[839] Q. Alright sir. You were there, and you knew what he was going there for?

A. No, he just pulled up and done it.

Q. He just pulled up and did it?

A. At Isom's. He said . . .

Q. I'm talking about the White house, Mr. Street.

A. Yeah.

Q. You knew he was going there for the purpose of breaking in, because you discussed it up at your house, didn't you?

A. No, we didn't discuss it up at the house.

Q. So that part of your statement is . . .

A. He said he knowed a place where we could go and make some money, and we got down to about the car wash, and he told me he was going to Dave White's house.

Q. Alright. You sat there in the car — you saw what he did, didn't you?

A. Yeah, because when we was going up there, I thought he was going to borrow some money off of 'em or something.

Q. Well you knew he wasn't going to borrow money when he broke the door open and went in and got the skil saw and the drill?

A. No. Well now what was that question again?

Q. Did you see him break open the door and get the skil **[840]** saw and the drill?

A. I didn't see him break open the door. I saw him get the screw driver and stuff from behind the seat.

Q. Well what did you think he was going to do with the screw drivers? Did you think he was going to use that to borrow money?

A. Naw.

Q. You knew he was going to break in. Let's be honest with the ladies and gentlemen of the jury, Mr. Street. You knew he was going there for the purpose of breaking in, didn't you?

A. No, not 'til I got there, I didn't knowed it.

Q. And when you got there and he got the screw driver out and started around, started around to the tool shed you knew he was going to break into the house?

A. Yeah.

Q. Alright sir. And you knew he had broken in when he returned with the saw, with the drill and the other items that were stolen?

A. Yes, sir.

Q. The extension cord. You knew it was stolen property?

A. Yes, sir.

Q. You knew that the house had been broken into, an out building had been broken into?

[841] A. Yes, sir.

Q. And you told the officer later that Glenida Peele tried to break into the house?

A. Yeah, she went up — she went up on the porch and looked in the windows.

Q. Okay. So you knew right then that you were involved in — in a crime?

A. Yes, sir.

Q. But you went with Mr. Peele, you didn't ask to be taken home?

A. After we came back from tire and recapping, after we sold that extension cord and stuff, I asked to be taken home to get me something to eat.

• • •

[843] • • • Q. Then after you knew that he had broken into a house and stolen some items, when did you next see Clifford Peele on the 26th?

A. After I got done eatin (sic), he come back to the house.

Q. He came back to your house. And then you left with him again to break into another house, didn't you?

A. I didn't know he was going to break into it. He said let's go ride up around the lake, and I said well let's go.

Q. Okay. So you didn't know you were going to the first break in?

A. Not 'til I got there.

Q. Not until you got there. And you didn't know that he was going to the second break in until you got there?

A. That's right, 'til we got — til we passed the second one up, and he said there's a good place to break into and turned around and went back.

Q. Alright. And you got out of the car with him that time?

A. Yeah, I pushed him up to a window.

[844] Q. You got him up and helped him get in a window?

A. Yeah.

Q. Alright. You knew he was breaking into the house?

A. Yeah.

Q. You knew what you were doing?

A. Yeah.

• • •

[851] *** Q. Okay. And you got a knife from that burglary too, didn't you?

A. Yeah, Clifford Peele gave me a knife.

Q. What kind of a knife was that?

A. A case double X.

Q. With a black handle?

A. Yeah.

Q. And you kept that knife didn't you? Put it in your pocket?

A. Yeah.

Q. Alright sir. Let me just take your statement, since **[852]** you said the Sheriff supplied you this information. I want you to just take it page by page, I suppose. And I want you to stop me and tell me what is the truth — what you told the Sheriff and what the Sheriff told you, and what Don Collins told you, and what Lynn Brown told you and what your father told you to say. Alright sir? This is your statement that was taken on the 17th day of September, 1981, starting at 9:27 in the evening of that day. Now where was this statement taken?

A. The Sheriff's Department.

Q. The Sheriff's Department. I'm going to start reading it, and you stop me where somebody starts telling you what to say. "On Wednesday August 26th, 1981 . . .

MR. STUART HAMPTON: I'm going to object to the form of that question. Let him read it off and ask him if it's true or not true, or who made it or who didn't make it, or if he made it or somebody else made it.

GENERAL CROCKETT: That's what I'm trying to do here.

MR. STUART HAMPTON: He's asked him to stop him and I don't think that's fair.

MR. BILL HAMPTON: I don't think it's proper, Your Honor.

THE COURT: Just ask him questions and . . .

Q. "On Wednesday August 26th, 1981, after I got up sometime **[853]** around 8:30 or 9 o'clock, Cliff and Glenida Peele came to my house in Hampton on Tinker Hill . . ."

A. Yeah, that's true.

Q. . . . is that a true statement? "Clifford Peele asked me where some of the old people were who lived on the hill that they could break into their houses . . ."

A. That's not true.

Q. That is not true?

A. That's right.

Q. The second sentence of your statement, of your eight page statement is not true. Who supplied that information to you?

A. George Papantaniou.

Q. Sheriff Papantaniou supplied that to you. "I told Cliff Peele, Rainbolt, Miss Woods and old man Phillips and Ben Tester" — is that a true statement or is that also the testimony of Sheriff Papantoniou?

A. I made that statement, but I lied about it.

Q. Alright. So the first statement was Sheriff Papantoniou's and the second statement was a lie?

A. That's right.

Q. "Cliff Peele asked me who went to church" . . .

A. That's a lie.

[854] Q. That's a lie. "I told Cliff Peele that Ben Tester went to church all the time" . . .

A. That's a lie.

Q. That's a lie. "Cliff Peele asked me where Ben Tester lived."

A. That's a lie.

Q. That's a lie. "I told him the green house down below me, over next to the woods."

A. That's a lie.

Q. "Cliff Peele said that would he — that would be a good place because if anyone comes we could run into the woods."

A. George made that up.

Q. George made that up.

A. I told him he lived next to the woods and George made the rest of it up from there.

Q. Alright. "Cliff Peele said he heard that Ben Tester had some gold and a gun in the house."

A. George told me that.

Q. The Sheriff made that up. "Cliff asked me if I thought Ben Tester had any money in the house."

A. Do what now?

Q. "Cliff — Cliff asked me if I had — if I thought Mr. Tester had any money in his house."

[855] A. That's a lie.

Q. That's a lie. "I told Cliff Peele that my mother, Janice Street, had told me that Ben Tester was supposed to have around ten thousand dollars to buy a new car."

A. I told him that, but I heard — my mom was tellin (sic) me that. It was either on a Thursday or Friday, and the greek mentioned it too.

Q. Okay. So you're telling — that is the truth then that you made that statement?

A. Yeah, the part there that I heard he had ten thousand dollars — I think my mom told me, but my mom told the Sheriff somethin (sic) about it.

Q. That part is true. "Cliff Peele told me to get the money, we could get a couple pounds of pot and some acid."

A. That's a lie.

Q. That's a lie. "that we could all go to Indiana and we could get by with it."

A. He was talkin (sic) about going to Indiana.

Q. Alright, did you make that statment then, that — it was a lie that Cliff Peele said he wanted to get the money, but it's the truth that he wanted to go to Indiana?

A. Yeah, he was wantin (sic) to go to Indiana.

Q. Alright sir. So that statement you made is the truth?

[856] A. After he got the money for them guns, he was wanting me to go to Indiana, and I said no I ain't leaving the state.

• • •

Q. Do I understand, Mr. Peele (sic), that as you're giving this, that you make one statement and that — that Officer Collins would write that down, and Sheriff Papantoniou would make another statement, and he would include that in as part of your statement, and then you would add another statement, is that what you're saying was the sequence of taking your confession?

A. If you ask the right question. I ain't Mr. Peele.

Q. I mean Mr. Street.

A. I answered it with . . .

Q. I'm asking you again, sir, if you'll answer it for me. Would you like for me to ask it again?

MR. BILL HAMPTON: I think he would Mr. Crockett.

Q. All right. Do I understand that the Sheriff — in other words you started off and said the first sentence was true and you said the second sentence was that of the Sheriff's and that subsequent sentences were that of the Sheriff's and then you finally came down and said the last sentence that I read was your own, would you make a statement, and then the Sheriff would make a statement, and then you would make another **[857]** statement and Don Collins would write it all down, is that what you're saying?

A. Yeah, George — George he kept me in — before Collins came he had me up in his office — he kept going over that statement with me of Peele's. He went over it about, I'd say three or four times with me.

• • •

[858] • • • Q. And you say the reason that you lied all the way through your statement was because you want to go home?

[859] A. I knowed I could get them people that I indicated in it for witnesses and they'd find out that I was telling a lie and wouldn't be charged with it, and turned around and did it.

Q. Why didn't you simply say in the presence of your father that you wanted your lawyer, that you didn't want to talk anymore? They discontinued other statements when you said that, hadn't they?

A. I asked for my lawyer, and I told you what the Sheriff said. He said you don't need a lawyer and you ain't going to get one.

• • •

[860] • • • Q. All right sir. Don Collins was there from 9:20 until 1 o'clock, during the taking of your confession of the murder of Ben Tester?

A. Yeah, he walked out of the room a few times.

Q. Did you ever walk out of the room?

A. No, I started to and every time I'd start to they'd **[861]** say lock him up.

Q. Well in fact, Mr. Street, who said to lock you up?

A. Sheriff.

• • •

[866] • • • Q. Alright sir. As a result of the — in any event whether you were in jail or whether you weren't, which apparently you don't know, the Sheriff said he was going to throw you in jail if you didn't confess?

A. He said if I didn't confess and say I done it, I'd be shipped down the road the first thing in the morning — said I wouldn't get to see my parents no more for ten or fifteen years.

Q. And what was he going to send you down the road for?

A. For that grand larceny.

Q. And that was — had you entered a plea under grand larceny?

A. Yeah.

Q. And what was it you had stolen? What is it you had plead guilty to?

A. I plead guilty to it that I was with them while it was going on—I was an accessory.

Q. You had plead guilty to what?

A. Grand larceny.

Q. Of what? In what case?

[867] A. The Isom.

Q. The Isom case. And this was in juvenile court?

A. Yeah.

Q. You had been found guilty — you were a juvenile at that time?

A. Yeah.

Q. And it was handled as a juvenile case?

A. Yeah.

Q. Was not transferred as this murder case has been for trial as an adult?

A. No.

Q. So you were before Judge Ray, Judge Jesse Ray the Juvenile Judge?

A. Yeah.

Q. You had entered a plea of guilty?

A. Yeah.

Q. You had told him that you were guilty and had participated in that burglary?

A. No, I just said — he asked me what I plead and I said I plead guilty

Q. And what had he sentenced you to?

A. He didn't sentence yet — me yet but he said I sentence you to the department of corrections — he didn't say how long **[868]** or nothing. Then he told me to come back on a certain date.

Q. So the Judge had told you that you were sentenced to the department of corrections, that you were to come back at some later date, before him, the Judge, to determine what sentence

you were to receive — and it was during this period of time that the Sheriff was threatening to send you to the penitentiary for ten or fifteen years?

A. Yeah.

* * *

[870] * * * Q. Having been in and out of jail apparently a number of times, are you not aware that a juvenile cannot be sent to the penitentiary?

A. No.

Q. Were you aware that the Judge hadn't even imposed sentence on you at that time?

A. Well he — he done — he — Judge Jesse Ray said I was guilty and he sentenced me to the department of corrections, he didn't say how long or nothing.

Q. And that you were to be brought back before him at a later date to determine how long?

A. Yeah.

Q. And was Judge Ray there that night?

A. What night?

Q. The night that you made this confession? The night that you say you were afraid that you were going to be sent off to prison for fifteen years?

A. Yeah, at the end of it he walked in.

Q. Did you tell Judge Ray that — that you didn't want **[871]** to be sent off or could the — did the Sheriff have the power — did you ask him that?

A. No.

Q. Well if you were so concerned, why didn't you?

A. He was talking to the Sheriff.

Q. Well, why didn't you say Judge Ray don't send me off?

A. I knowed he was going to send me off, Crockett, for that grand larceny.

Q. Well what did you think he was going to send you off for?

A. What do you mean? He was sending me off for grand larceny. The department of corrections, it all depends on how you act down there — if I go down there on that grand larceny I could have got out in nine months, that'd — that beats ten or fifteen years, don't it?

Q. Okay. So you knew then that the worst you could get from the department of corrections for this larceny, of your own knowledge, was nine or ten months?

A. Yeah.

Q. Well, how did you think the Sheriff was going to send you off for fifteen years?

A. I — he conjurs (sic) up everything.

Q. But you don't conjure up anything, do you?

[872] A. I'm telling the truth.

Q. Today?

A. Yeah.

Q. You didn't tell the truth on the 28th of July — the 28th of August, or you say the officers didn't tell the truth about what you said?

A. Right.

Q. The officers didn't tell the truth on the 17th — Officer Collins didn't tell the truth, and — about what you said on the 17th in this confession, that you say you didn't give?

A. I didn't give it. George gave the confession.

Q. Alright, sir. So Don Collins was wrong on that?

A. Every time I'd say something wrong, Sheriff George Papantoniou would say; "hold it, back up, you're telling a God damn lie."

Q. And he said that in the presence of Attorney General Brown?

A. I don't know if Brown was there or not. I can't remember . . .

Q. You can't remember if . . .

A. . . . Brown was down there for a while. He kept walking in and out. I don't remember if he was in there or not.

Q. How many times did he tell you that you were telling **[873]** such a thing, and use that language?

A. About all the time.

Q. About all the time.

A. Said you're telling a damn lie.

Q. So if Agent Collins was there writing it down, he would certainly have been in a position to hear all these things?

A. Yeah.

Q. And he would know about the Sheriff saying this to you, not one time, but many times? Is that correct, sir?

A. Yeah, I guess.

* * *

[877] * * * Q. Assuming that this is your father's signature, as it purports to be at the start of this statement, and at the conclusion of this statement, do you have any idea at what point your father left? If any.

A. I know he wasn't there when I made that. He came in and signed as my father.

Q. He signed at the first and he signed at the end, but he wasn't there during the five hours that you were being interrogated?

A. I don't know if he was there at the end or not. But **[878]** know he wasn't there while I was making that.

Q. In fact, how did you get home that night?

A. I believe it was my mother. I'm not for sure.

Q. Do you remember being asked, Mr. Street, on July 2nd twenty some days ago, do you recall being asked by me; "So you didn't tell your mother on the way home, because you didn't go home with your mother, but you told her after you got home?" Your answer was; "I went home with my father." Do you want to correct that part of your statement; "Yes, I went home with my father." And which is correct today today? Your memory was apparently clear twenty days ago — are you confused today?

A. I'm pretty sure I went home with my mother.

Q. So you were incorrect then on July 2nd, when you said you went home with your father?

A. Yeah.

* * *

[881] * * * Q. Do you know Lynn Brown . . .

A. Yeah.

Q. . . . Attorney General Lynn Brown?

A. Yes, sir.

Q. How long have you known him?

A. Year or two.

Q. He's known you since you were a little boy, hasn't he?

A. I ain't knowed (sic) him. I've seen him around.

Q. Alright, sir. Was he present during the taking of this statement?

A. He'd walk in and out.

Q. How many times did he tell you that night that you were free to go, you could go any time that you wanted to go?

[882] A. I didn't hear him say none.

Q. Do you deny that?

A. Yes, sir.

* * *

[884] * * * Q. Alright. And do I understand it to be your testimony that the Sheriff told you that if you did not confess to a murder, that you were going to be sent off for fifteen years, and never see you mother and daddy again?

A. Yeah.

Q. But that if you would confess — that if you would tell him that you took a man out and helped put a rope around his neck, and hung him in his own tree — the Sheriff told you that he would let you stay in the Carter County Jail and make a trusty out of you?

A. Yeah, or I could go home. He said if I was arrested he'd put me in the Carter County Jail and make me a trusty, for the rest of the time I'm there.

Q. And let you serve your time as a trusty in the Carter County Jail for one of the most brutal murders that's ever **[885]** occurred in Carter County?

A. That's what he said.

Q. That's what he told you.

A. That's right.

Q. And you're as certain of that, as you are of everything else that you've testified to?

A. Yes, sir.

Q. Did you tell this Agent Don Collins that, said that, if I tell you about this the Sheriff's going to let me be a trusty in the Carter County Jail?

A. I can't remember.

Q. Did you tell Mr. Brown that?

A. No, sir, don't believe I did.

Q. Did you tell your father that?

A. I can't remember if I did or not.

Q. You sat there for five hours and fabricated a story—for five hours you fabricated a story and made it up as you went along, you say, or took it from what the Sheriff testified for you to Agent Collins, and never one time told them that you were telling this story so I can be a trusty in the Carter County Jail for the rest of my life?

A. Yes, sir.

Q. And you never said that to anybody?

[886] A. Not as I can remember. I ain't for sure.

Q. Now, these people that were present there, Mr. Brown and Agent Collins and your father, for these five hours that they were there, or you say some of them came and went — during that five hour period did the Sheriff repeat that to you at any time? That if you didn't tell the truth, that you were going to be — or if you didn't confess that you were going to — to the murder that you were going off, and if you did confess you could stay in the Carter County Jail as a trusty?

A. I can't remember, but I believe he did. I ain't for sure.

Q. In the presence of Agent Collins?

A. No, I believe that's when Collins walked out.

Q. What about Agent Huckaby?

A. He didn't stay there no time.

Q. He didn't stay there. What about Lynn Brown?

A. He came and go — went.

Q. Well what — what happened then when the Sheriff would catch everybody out of the room, then he would threaten you again?

A. Yes, sir.

Q. Is that what you're saying. I see. Well, why didn't you report this to these people when they came back?

[887] MR. BILL HAMPTON: Your Honor, he's asked him that once before.

THE COURT: Well, this is cross examination. I'll allow him to ask it.

MR. STUART HAMPTON: It's awful repetitious.

Q. Why didn't you tell these people that when they got back?

A. They wouldn't have believe me, you'ns (sic) would have believed him — called me a liar or somethin (sic).

Q. Well, why — didn't you ever try that — did you try it just one time?

A. No, there wasn't no need.

Q. One time in five hours, you didn't try it, did you?

A. No, cause I knowed (sic) what they'd say.

Q. In fact, you went right through this statement — and let me go back to it. We had gotten to that part of the statement, Mr. Street, where you learned that Mr. Tester was supposed to have ten thousand dollars to buy a new car. Who suggested that to you?

A. I heard the Sheriff talking about it, and my mom mentioned it to me one day.

Q. Your mom had told you that she had overheard a conversation, didn't she, that Ben Tester . . .

[888] A. She said that she heard that he was supposed to have ten thousand dollars.

Q. Your mother told you that Ben Tester was supposed to have ten thousand dollars?

A. Yeah, after I confessed to that. George told me while I was confessing to it. He said he was supposed to have ten thousand dollars to get a new car.

Q. Well, what's this about your mother telling you this?

A. She said she overheard it — someone talking, that she heard them say that Ben Tester had ten thousand dollars.

Q. And you had heard that from your mother, hadn't you?

A. Yeah, and I heard it from the Sheriff first, though.

Q. You are now saying that the Sheriff suggested this to you, and that your mother then later told you the same thing?

A. That's right.

Q. That's what you're saying. And when did the Sheriff suggest that to you?

A. I can't remember.

Q. The night of this statement?

A. The night of the statement or the night before.

• • •

[889] • • • Q. My records also indicate that on the 11th of September, 1981, you made a statement at the Carter County Memorial Hospital, do you remember that?

A. Yes, sir.

Q. Is that statement true?

A. No, sir.

Q. Why did you lie on that particular occasion?

A. Cause I was wantin (sic) to go home.

Q. Were you in jail at that time?

A. I can't remember if I was or not.

Q. You were at the hospital. Your father had been injured in a car accident.

A. Yes, sir.

Q. Your mother was there?

A. Yeah.

[890] Q. Right outside the door?

A. Yes. I don't know if she was right outside the door or not. I don't know that.

Q. You saw her as soon as you went outside the hospital room, didn't you?

A. Yeah.

Q. Well, isn't it safe that she was outside the door, that was my question, sir?

A. That don't mean she was outside the door or not, she could just have came up or somethin (sic).

Q. She was outside the door when you came out of the room?

A. Yeah, she just came around the corner there.

Q. How do you know where she came from if you were in the room?

A. Well, when I walked out the door, she walked around the corner. She could have just got there. I don't know, she could have already been there.

Q. Your father was there?

A. Yes, sir.

Q. He had been injured in a car accident?

A. No, not a car accident, but he was injured.

Q. A car had — had he not had a wreck with a road grader?

[891] A. Yes, sir.

Q. He was driving an automobile or truck?

A. He was driving a road grader.

Q. And the road grader had wrecked . . .

A. Yes.

Q. . . . and he had been injured?

A. Yes, sir.

Q. He was conscious and in the hospital?

A. Yes, sir.

Q. You were taken there in his presence . . .

A. Yes, sir.

Q. . . . and he urged you to tell the truth, didn't he?

A. Yes, sir.

Q. And you said you would tell the truth?

A. Yes, sir, believe I did.

Q. And you told a lie?

A. Yes, sir.

Q. You were not under arrest?

A. I was, let's see, I was down at the jail when they took me over. I can't remember if I was under arrest or not.

Q. How had you gotten down to the jail?

A. The deputies came and got me.

Q. When the statement was over, you went home?

[892] A. Yes, sir.

Q. So you were not under arrest, you were not in jail, and you were not held in jail at that time?

A. I believe I was in jail over that grand larceny. I ain't for sure.

Q. You were in jail on grand larceny and you were allowed to go home?

A. Yes, sir. I can't remember for sure.

Q. And in that statement, you admitted knowing about the murder of Ben Tester, but not participating in it?

A. That's what I said, but it wasn't the truth.

• • •

[900] • • • Q. Alright, sir. So then in this statement that you made on the 11th, that was false? The statement on the 28th was false — of September, the statement on the 11th, I mean the 28th of August, was false. The statement on the 11th August was false — 11 September was false? And when you said that Clifford Peele and I got up in the truck, and Eugene Montgomery climbed up into the tree and tied the nylon rope around the tree limb that was false?

A. Yeah.

Q. And the rope hung down and Clifford Peele — Clifford Peele tied the loops and put them over Ben Tester's head, down around Ben Tester's neck . . .

A. That's false.

[901] Q. . . . that's false? And when you — and when you told . . .

A. I was trying to get back at Clifford Peele for telling, for saying that we went and stole some shotguns.

Q. So you decided to put him on the scene of the murder?

A. Yeah.

Q. Did you know at that time that Clifford Peele had in fact said that he was at the scene of the murder, and you were there with him?

A. Yeah, after George was reading me his confession. They brought Clifford Peele down in front of me -- George did, and George said talk, and Clifford said Joe you was there when I done it, and you helped.

Q. Well, what did you say?

A. I said you're crazy.

Q. You said he was crazy, and then you turned and . . .

A. And he got up and started to hit him and George jumped up and Judge Ray jumped up.

Q. So you're not afraid of Clifford Peele?

A. That's right.

Q. He's no bigger than you are, is he?

A. No, he's about the size I am.

Q. He about the size you are and he's less than a year older, two years older . . .

[902] A. That's right.

Q. . . . so you can handle yourself with him — it wasn't any situation that Clifford Peele took you and lead you off to do something that you didn't want to do — he couldn't — he certainly couldn't make you do that, could he?

A. No.

• • •

[905] • • • Q. Well, then why did you as late as the 27th of last month, of June, the last statement that you made, why did you

tell the Sheriff on that occasion — just less than a month before this trial, why did you ask to come down and talk to the Sheriff, if you disliked him so much?

A. Everybody up in the cell block was hollering that you're going to get the electric chair — you're going to get this and you're going to get that, and I went down there to see if I could get the electric chair, if they was going to give it to me or not.

Q. So you wanted to talk to the Sheriff about getting — whether you were going to get the electric chair?

A. Yeah.

Q. Did you have an attorney at that time?

A. No, sir.

Q. You did not have Mr. Ha.npton and his nephew?

[906] A. Yeah, they's my attorneys, yeah.

Q. And they had been your attorneys for how long?

A. Since I've been charged with this.

Q. Did it ever ocur to you to ask your attorneys that, that that's what they are there to advise you, not the Sheriff?

A. They's suppose to come back the next morning, and I was wanting for find out from the Sheriff to see what he had to say about it.

Q. How many times have you been into court and been in conference with your attorneys during that period of time?

A. I don't know.

Q. Many, many times?

A. I'd say so.

Q. Did you ever ask them that?

A. Yeah, they said I'd probably get the chair.

Q. Alright, sir. So then instead of taking what they said, you're saying that you elected to go down to this man who made

you lie and who threatened you and who had done you so wrong and that you disliked so much, you wanted, you kept sending notes to go down and talk to him?

A. Yeah, cause I wanted to see if I was going to get the chair, and when I went down and asked him he said yeah I'm going to see that you do get the chair, you and Glenida Peele both.

[907] Q. And that's when you told him that you helped put the loops around Ben Tester's neck, but it was because your uncle, Kelly Banner, had made you do it?

A. No, they asked me, said have you got any reason to be scared of your uncle, Kelly Banner, and I said no I ain't got no reason to be scared of my uncle.

Q. So when Bob Colbaugh, the Judicial Commissioner, do you know him?

A. Yes, sir.

Q. Has he ever threatened you?

A. No, not as I know of.

Q. Has he ever said or done anything unkind to you?

A. I don't know.

Q. He is not an employee of the Sheriff's Department, is he?

A. I don't know that.

Q. Do you know why he would say that; "Street told me that — and John Henson, who is a deputy sheriff, and the Sheriff, that it was the truck," when he showed you a truck. Do you remember seeing the truck out in the Sheriff's Office? Sheriff's Garage?

A. They took me out down there and they said is that Larry Bobbitt's truck, and I said yeah that's Larry Bobbitt's **[908]** truck.

Q. So when he says that Street told me and John Henson and the Sheriff that it was the truck that they used to hang Tester

from, that his uncle, Kelly Banner ordered him and Joe Street to put the rope around — ordered him, Joe Street, to put the rope around the neck of Tester. Street also said that there were around fourteen people present at the murder scene and named Kelly Banner, Cale Hazelwood and Don Grant as being in the yard at the time of the murder.

A. They asked me if Don Grant and Cale Hazelwood was there, and I said I don't know I wasn't there myself.

Q. And you don't know how Bob Colbaugh could so misinterpret what you said?

A. That's right.

Q. He just wrote down this statement saying that you were there, and that you had put the rope around his neck, and it's not true?

A. It's not true.

* * *

[913] * * * Q. Now, do you recall Officer — Officer Ray Williams, Constable, Carter County, being in your jail cell or where you were in the Carter County jail on November 23rd, 1981?

A. Yeah, he came up to the cell.

Q. Do you recall telling him that you knew where there was a white truck with the clothes in it that had come out of the house of Ben Tester?

A. No, sir.

Q. That you said that there was another person involved **[914]** that you didn't know his name, but you knew where the white truck and the clothes were that had been stolen . . .

A. No.

Q. . . . or that came out of the house? And where it was and where the guy was that owns the truck?

A. No, sir.

Q. You deny that?

A. Yes, sir.

Q. You never had a conversation with Ray Williams to that affect?

A. No, sir, he asked me about his walkie-talkie.

Q. He asked you about his walkie-talkie and that was all, and anything else that he would add into — he has added into this statement is something that is totally false and untrue?

A. He — he told me, he said, "if you can find out who get my walkie-talkie, I'll do something for you." And I told him I didn't see nobody around his jeep but him and Mike Sergeant.

Q. So you never had a conversation with Ben — concerning Ben Tester, the murder of Ben Tester with Ray Williams?

A. That's correct.

Q. And why he would tell such a story about you, I take it also you don't know?

[915] A. That's right. The Sheriff probably put him up to it.

Q. How did you know there was a sheet in Ben Tester's house?

A. George said it.

Q. The Sheriff told you that?

A. Yes.

Q. Did he tell you that in the presence of Officer Collins who was writing this statement down?

A. I can't remember.

Q. You don't remember that?

A. That's right.

Q. How do you know there was a piece torn from that sheet?

A. The Sheriff told me, said, Mr. Tester was gagged with it. Said I tore it and he was gagged with it. Said I put the gag in his mouth and Eugene tied the knot, so I just went on what he said.

Q. Did he tell you that in the presence of Agent Collins?

A. I can't remember. Could have been.

Q. I take it he was furnishing you this information all along as you made your statement?

A. Yes, sir, he — every time I tell a lie, he'd be reading Peele's statement.

[916] Q. Uh-hum. And, so you — so he was reading it to you and telling you what to say in the presence of Agent Collins?

A. He was reading it to me sometimes and he read it to hisself most of the time. About all — all the time.

Q. All right, sir, well, anything then that you say he suggested to you, would have been suggested in the presence of Agent Collins?

A. I don't know, it could have been.

Q. Well, you were there, sir, I was not.

A. It's been — it's been ten (10) months ago.

Q. Yes, sir, I understand it's been ten (10) months ago; well, was the Sheriff reading it out loud in front — in the presence of Agent Collins or not, if you know?

A. I don't know.

Q. How did you know that, "Cliff said, we're going to make it look like suicide?"

A. I just made that up.

Q. You just made that up?

A. Yes, sir.

Q. That was not in any of the other statements? Why did you make that up, sir?

A. I was trying to get even with Peele. For telling on me for that . . .

[917] Q. How did you know what kind of rope was used?

A. George showed me the rope. He showed me that tree limb that they got.

Q. He showed you the tree limb?

A. Yes, sir.

Q. How did you know two (2) loops were used?

A. I didn't — I ain't — I did't say they was two (2) loops used. I don't even know if there was or not, was there?

Q. This was removed from the neck of Mr. Tester. How many loops do you see?

A. Two (2).

Q. Did you make reference to that in your statement? That two (2) loops were used?

A. No, sir, not as I know of.

Q. Did you use 'loops' as opposed to a single 'loop' that you normally or single noose that you normally think of in a hanging?

A. I don't know, I wasn't there at that murder.

Q. Did you use the word 'loops' in your statement, sir?

A. I don't know. Could a had.

Q. How did you know that Ben Tester's shirt was ripped?

A. George showed me the pictures of him.

Q. Where did he show you the pictures?

[918] A. In his office. He showed them to me and my mom and

mom started getting sick and I told him to put them pictures away.

Q. What was Mr. Tester doing when, or how was his body positioned in these photographs?

A. I can't remember.

Q. You don't know whether he was on a stretcher, in the tree, where was he?

A. He . . .

Q. What photographs were shown to you that made such an impression on your mind?

A. All of them. All of them was showed. He sat there and went through them and showed them to me and my mom.

Q. What side of Mr. Tester's shirt was ripped?

A. I don't know.

Q. What color of shirt did Mr. Tester have on?

A. I don't know that neither.

Q. How did you know that the buttons had been torn from his shirt?

A. In a picture Don Collins showed me and showed me where the buttons was laying and everything.

[919] Q. Were these shown to you before the statement was taken?

A. I can't remember if it was or not.

Q. Didn't he show you those photographs after you gave him the statement on the 17th?

A. I believe — I ain't for sure but I believe he showed them during it. George, the Sheriff, George Papantonio, showed me before.

Q. George had shown them to you before?

A. Yeah.

Q. So you recalled that there were buttons torn off, so you included that in your statement?

A. Yeah.

Q. How was that going to help you, sir?

A. What do you mean?

Q. How did you think that that would help you in your statement?

A. I don't know, George said to put it down.

Q. So George told you, in the presence of Agent Collins, to be sure and include that in the statement?

A. I don't know, he said that they's buttons tore off.

Q. Well, you said that George — you just finished saying out of your own mouth, sir, that George told you to be sure and **[920]** put that down.

A. I didn't say that out of my own mouth. I didn't say that. You misunderstood.

Q. Well, what did you say, sir?

A. Well, what was your question?

Q. My question was, did Sheriff Papantonio tell you, in your presence and the presence of Agent Collins, to include the talk about the buttons being torn off?

A. I still yet don't understand you.

Q. Why did you say the buttons were torn off the shirt? How was that going to help you in this statement if it was not the truth?

A. I don't know, I said the way I saw it, I saw the buttons gone on the picture.

Q. So you just . . .

A. Showing a finger pointing to — to them.

Q. Did you know what part of Mr. Tester's house that was in?

A. No, sir.

Q. How did you know then that a struggle had occurred in the living room of Mr. Tester's home.

A. The Sheriff said they was.

Q. The Sheriff told you that also in the presence of **[921]** Agent Collins?

A. He — the Sheriff read his — Clifford Peele's statement to me about four (4) for five (5) times before Agent — TBI Agent Collins got there.

Q. You knew that money had been taken from Ben Tester, how did you know that?

A. The Sheriff.

Q. The Sheriff told you that?

A. Yes, sir. We went over that statement about four (4) or five (5) times before Collins got there.

Q. You knew there was more than one loop around Mr. — Mr. Tester's neck?

A. No.

Q. Because you referred to 'loops.' Who told you that?

A. I don't believe I said 'loops.'

Q. You don't think you said 'loops,' so if that appears in your statement, then that would be just something that someone added or that you said inadvertently? Unintentionally?

A. I don't know nothing about that. I don't know what's going on.

• • •

[922] • • • Q. How did you know a knife was used to cut the screen? That your own knife was used?

A. The Sheriff said, "you used you own Case double X (XX) knife to cut that screen that came out of Walley Ishom's house, didn't you?"

Q. And he said that, I take it, in the presence of Agent Collins?

A. I believe so, I ain't for sure.

Q. And then you replied, "yes, I used that black Case double X (XX) knife that came out of Walley Ishom's house to cut the screen."

A. I told him I didn't have no Case double X (XX) knife I only had that black handled knife I got off my grandma and grandpa. It wasn't no Case double X (XX).

Q. Well, that was — that was a falsehood too, wasn't it?

A. That's right. I didn't have no Case double X (XX), I . . .

Q. What did you do with the Case knife? You just testified this morning that you had one that had — you'd taken **[923]** from that house.

A. I had one, yeah, I had one.

Q. Well, where was it?

A. I got rid of it.

Q. What did you do with it?

A. I sold it.

Q. Who to?

A. A certain person.

Q. Who to?

A. A certain person.

Q. I'm asking you who it was.

MR. STUART HAMPTON: Answer. Answer. Answer it.

THE COURT: Answer — answer the question.

MR. STUART HAMPTON: If you know.

A. I don't really know his name. I've just seen him around in Hampton.

Q. And you sold it after this murder, didn't you?

A. No, I sold it before.

Q. Well, you have detailed in great — in great detail, Mr. Street, you have told us your whereabouts on the 26th. The day of this murder. Also the day you stoled this knife. Now just at what point did you sell this knife and to whom?

A. I don't know his name.

[924] Q. Where did you sell the knife?

A. I believe it was at the pool hall that night, I ain't for sure.

Q. What did he look like? This person that you know, that you're refusing to tell us who his name was, that you see around Hampton.

A. Red hair, kind of small.

Q. Have you seen him since that time?

A. No.

Q. Is there any reason you haven't told anyone about this knife that was stolen before?

A. Nobody ain't asked me if I sold it or not.

Q. You just happened to have sold that knife to somebody that you didn't know right before this murder occurred, that's just a coincidence?

A. Yeah, I sold it that night; it was — I believe I sold it for seven fifty (7.50) or eight (8) dollars.

Q. All right, sir. For how much?

A. About seven fifty ($7.50) or eight ($8.00) dollars.

Q. Seven fifty ($7.50) or eight ($8.00) dollars. Why did you need money that night?

A. I didn't have no use for a knife. I don't ever do carry a knife.

[925] Q. How did you know that the window screen had been cut?

A. The picture.

Q. You just looked at that picture and knew immediately the window screen had been cut?

A. Yeah, and George said it was cut with your knife.

Q. So you went ahead and — you went along with that in the presence of Agent Collins and said that it was?

A. Yes, sir.

Q. How did you know that — did you know what had happened to Mr. Tester's wallet?

A. George said it was laying in the bedroom and I said yeah, but . . .

Q. Had you ever been in Mr. Tester's house before?

A. No, sir.

Q. How did you know it was in the right front bedroom? How did you even know there was a bedroom on the right front of the house?

A. I just made it up.

Q. And it just happened to be where the wallet was found? You made it up and the wallet was found in the right front bedroom? That's just another coincidence?

A. Yes, sir.

Q. I see. How did you know that someone had climbed into [926] the tree to tie the rope?

A. Well, George said he had footprints on the tree and he said it was my tennis shoe mark. Said he was wanting one of tennis shoes.

Q. He was wanting one of your tennis shoes?

A. Yeah. He said he's got my footprints on the tree.

Q. Well, you knew that — you knew that that couldn't be true, didn't you? Because you hadn't been in the tree?

A. I told him, I said, "if you want my tennis shoe, I'll get you one."

Q. Since you were going along with whatever George told you and that he said that he had your footprint in the tree, why didn't you just tell George you climbed the tree?

A. I don't know.

• • •

[927] • • • Q. And you told — you told where the wallet was and you told the Sheriff and T.B.I. Agent that you — that Eugene Montgomery climbed the tree, didn't you?

A. Yeah.

Q. Well, why did you do that, sir?

[928] A. I don't really know. George kept saying he wanted Eugene Montgomery in on it bad; he said, "I've been after him a long time and I'm gonna get him yet."

Q. So you decided just to bring Eugene Montgomery into it?

A. Yes, sir.

Q. Did he also tell you he wanted Kelly Banner in on it?

A. No, sir, not at that time he didn't. Down there on the 27th, he said, "I'll get Kelly Banner in on it if it's the last thing I do."

Q. How did you know that money had been taken from Ben Tester's wallet?

A. George said that thirty some dollars was gone. I believe he said it was thirty-two (32), I ain't for sure.

Q. How did you know the house had been ransacked and shirts had been taken?

A. In the pictures.

Q. You knew from the pictures?

A. Yeah.

Q. Was that the only way you knew it?

A. Yeah.

Q. Well, what picture is there that shows the shirts missing? How did you know the shirts were missing?

[929] A. George kept asking, he said, "where's the shirts that you got out of his house; what did you do with them?"

Q. Oh, so now is wasn't the photographs, it's what George told you?

A. Well, it was the photographs and what George said.

Q. You're adding on to that now that the question is asked?

A. He — he — he asked me, he said, "what did you do with the shirts, I know you got them." He said, "where did you hide them at?

Q. All right, sir. So you knew shirts had been taken, the house was ransacked, so you included that in your statement?

A. Yes, sir.

Q. Did you know that — how did you know that a struggle had occurred in the living room of Mr. Tester's home?

A. When the Sheriff was reading Peele's statement. Peele said that I grabbed him and throwed him to the floor.

Q. Does Peele's statement say what room it was in?

A. He said at the front door, I believe.

Q. So you just assumed that that was the living room?

A. At the front door, you know that's got to be the living room.

Q. So you, in your statement, added that in, that you [930] struggled with him in the living room . . .

A. Yeah, but I didn't.

Q. . . . that his shirt was ripped, the buttons were torn from his shirt, you put all of that together in your mind to make your story sound real good?

A. Yeah and plus what the Sheriff told me to say.

• • •

[957] • • • Q. I want to ask you three (3) things about your alibi. Number 1, was Lester Rainbolt at the pool hall?

A. I . . .

Q. While you were up there between the hours of 8:00 and you say 10:00?

[958] A. I believe he was, I ain't for sure.

• • •

Q. What hours were you at the pool hall?

A. I was down there about 8:00 till something till 10:00, twenty-five (25) till 10:00, something like that. I ain't for sure.

Q. You were there from 8:00 until 9:30?

A. Something like that.

Q. An hour and a half?

A. Yeah.

Q. Did you see Lester Rainbolt there?

A. I ain't for sure, but I believe I did. They's so many people down there that night.

Q. You had him subpoenaed here as your witness on this occasion, did you tell someone that you had seen him there?

A. No, one of my witnesses said he seen him there.

Q. And what witness was that?

A. Ken Proffitt.

Q. Ken Proffitt was there — said he saw Lester Rainbolt. What about Gary Farmer? Was Gary Farmer there?

A. I believe he was.

[959] Q. And, either of these young men would certainly have seen you if you had been there in the pool room during those hours, wouldn't they?

A. I guess. The pool room was so full.

Q. How many people were there?

A. I don't know, they was a bunch there. It usually stays full.

Q. All right, it stays full. How large is the pool room?

A. It's got two (2) pool tables and — got two (2) pool tables and about ten (10) machines. Pinball machines.

Q. Ten (10) pinball machines and two (2) pool tables. Is it as large as this court area, behind the — from the bar forward to where the Judge is sitting?

A. Yeah.

Q. Is that about the size of the pool room?

A. The pool room, it's — I don't know, really.

Q. Do you recall seeing Mike Puckett there that night?

A. Yeah, I believe so.

Q. Who testified? And do you recall that he talked on the

telephone right before you hung up from talking to your girlfriend?

A. Yes, sir.

Q. And he was — that was one of the last things that **[960]** happened in that conversation, wasn't it?

A. On the phone?

Q. Yes, sir.

A. Yeah.

Q. In fact, you got the phone from him, said good-by to you girl and hung it up?

A. That's right.

Q. It was right after that you left the pool room?

A. That's right. I left the pool room after that, about five (5) — maybe five (5) or ten (10) minutes after that.

Q. Only five (5) or ten (10) minutes after you hung up the phone? After Gary Puckett gave you the phone, you talked for a few minutes, hung it up and left within five (5) minutes?

A. I don't know no Gary Puckett.

Q. Mike Puckett.

A. Yeah.

Q. You know him? He's the man who was talking on the phone, handed it to you, then you said good-by to your girlfriend, hung it up and left five (5) minutes later?

A. Five (5), ten (10) minutes later, yeah.

Q. No more than that?

A. I ain't for sure.

Q. No less than that?

[961] A. I don't even know.

Q. Five (5) to ten (10) minutes?

A. Yeah. It could have been longer, could have been shorter, I don't know, really.

* * *

[Defense Rests]

TESTIMONY OF LESTER RAINBOLT

[964] Direct Examination

By General Brown:

Q. What is your name?

A. Lester Rainbolt.

Q. You'll need to speak up, Lester. How old are you?

A. Fifteen (15).

Q. Where do you live?

A. Hampton, Tennessee.

Q. And were you subpoenaed to this trial?

A. Yes, sir.

Q. Which side subpoenaed you?

A. Street.

Q. Joe Street's side? Do you recall where you were on the evening of Wednesday, August 26th, 1981? That's the **[965]** Wednesday evening before Ben Tester's body was found on Thursday.

A. Hum?

Q. That — that Wednesday evening. Wednesday, August the 26th, last year, where were you that evening?

A. First I went to church, then after church we walked down to Al's Arcade.

Q. Wo — did you — were you with somebody at church?

A. Yeah.

Q. Who were you with at church?

A. Gary Farmer.

Q. Where did you go to church?

A. Hampton Baptist.

Q. And what time did you get out of church?

A. 8:00 o'clock.

Q. And, where did you go after church?

A. Al's Arcade.

Q. And what — what is Al's Arcade? Where is it located?

A. Down next to the four lane, next to the Ritter Town bridge, right across from the Ritter Town Bridge.

Q. Al's Arcade is a pool hall? It has . . .

A. Yes, sir.

Q. . . . two (2) pool tables and a few pinball machines **[966]** and such?

A. Yes, sir.

Q. Or was at that time. How long did you stay at Al's Arcade that Wednesday evening, August the 26th?

A. Till bout — till about 9:45 or a little after.

Q. What time — what time did you get there?

A. About four (4) or five (5) minutes after 8:00.

Q. So, you were there from 8:05 till about 9:45?

A. Yes, sir.

Q. During that period of time, did you see Joe Street at Al's Pool Hall?

A. No, sir.

Q. Did you see Jeff Causby . . .

A. No, sir.

Q. . . . at Al's Pool Hall? Did you see anybody — did you see Mike Puckett at anytime at — at Al's Pool Hall?

• • •

A. All right. He was leaving right as we arrived.

Q. So, at 8:05, when you arrived, Mike Puckett was leaving?

[967] A. Yes, sir.

Q. Answer Mr. Hampton's questions.

Cross Examination

By Mr. Stuart Hampton:

Q. Mr. Rainbolt, when's the first time you saw me?

A. Yesterday.

Q. You never seen me before then, had you?

A. No, sir.

Q. And, I called you in the — the General Sessions Judge's room over there with about ten (10) or fifteen (15) people, isn't that true? Yesterday? Did I talk to you yesterday?

A. I don't think so, sir.

Q. You don't think I talked to you yesterday?

A. No, sir.

Q. Didn't I ask you if you saw Joe Street at the pool hall that night? Didn't you tell me you couldn't remember?

A. Yes, you did talk to me.

Q. And, you told me that you couldn't remember whether you saw Joe Street at the pool hall on August the 26th, 1981, didn't you?

A. Yes, sir.

Q. And I said well, since you — you don't know whether [968] you saw him or not, I said I can't use you, didn't I?

A. No, sir.

Q. What did I say?

A. You — I don't remember.

Q. All right, sir. Thank you, you may come down.

Redirect Examination

By General Brown:

Q. Do you know whether Joe Street was at that pool hall that night or do you not? In other words, did you see him or did you not see him?

A. I did not see him.

Q. And do you specifically remember that — that night?

A. That part of that night. From church on.

Q. What makes that night stand out in your mind?

A. My mom told me to remember it.

Q. For any particular reason?

A. She said that I might be called to court to say that. That where I was the night — the night it happened.

Q. So you know that that's the night that Ben Tester was killed?

A. I knew it the day after that.

• • •

TESTIMONY OF GARY ALLEN FARMER

[969] Direct Examination

By General Crockett:

Q. You are Gary Allen Farmer?

A. Yes.

Q. What is your age, Mr. Farmer?

A. Fifteen (15).

Q. Do you reside in the Community of Hampton, Tennessee?

A. Yes.

Q. And you live with your mother and father?

[970] A. No.

Q. With whom do you live?

A. I live with my grandparents.

Q. Your grandparents?

A. Yeah.

Q. On the night of the 26th of August, 1981, do you recall that night?

A. Yes.

Q. Is there any particular reason that you remember that night?

A. Because the next evening when I went to Lester's house, Lester's mom told us to remember that night.

Q. Did you know that to be the night that Ben Tester was murdered?

A. I didn't know it till the next day when I got home from school.

Q. Is that when you had that conversation with your friend's mother?

A. Yes.

Q. Where had you been that night?

A. I went to church with Lester, then from church we went to Al's Arcade.

Q. What church did you attend?

[971] A. Hampton Baptist.

Q. Hampton Baptist, that is not the same church that was attended by Mr. — Mr. Tester, Ben Tester?

A. No.

Q. He went to Union Baptist which is up on the hill?

A. Yes. Yes.

Q. All right, sir, after you left church, what time did you get out?

A. About 8:00.

Q. And where did you go?

A. Down to Al's Arcade.

Q. How long does it take you to get from the church that you attend to Al's Arcade?

A. Maybe a minute or two.

Q. It's just about a block or so away, isn't it?

A. Yeah.

Q. And did you directly to Al's Arcade?

A. Yes.

Q. And were you in the company that night of your friend Mr. Rainbolt?

A. Yes.

Q. What did you do at the pool room?

A. Shot some pool and played a little bit of games.

[972] Q. How long did you stay there?

A. About 9:45, 10:00, 10:30.

Q. From — from what time till what time?

A. About five (5) after 8:00 till about 10:00.

Q. Till about 10:00, so you were there for almost two (2) hours?

A. Yeah.

Q. During that time that you were there, did you see Mike Puckett?

A. Yes.

Q. Where did you see Mike Puckett?

A. We met him as he was — we's coming in the door, he was a leaving.

Q. He was leaving, did he ever return to the pool hall that night?

A. No.

Q. All right, of course you don't know where he went after he left?

A. No, I don't.

Q. Did you ever see Joe Street there that night?

A. No.

Q. Would you have seen him or — or remembered him had you seen him there?

[973] A. Yeah.

Q. Was he there from the hours of 8:00 o'clock until 10:00, the same hours that you were there?

A. No.

Q. All right, sir, that's all.

Cross Examination

By Mr. Stuart Hampton:

Q. Do you remember shooting pool that night with Ken Proffitt?

A. Well, I shot pool with him a lot, I don't know if it was that night or not, I've shot pool with him all the time when he's down there.

Q. Where's the telephone in the pool hall?

A. It was on — it was on the wall.

Q. It's a possibility or any possibility that Joe could have been there and been on the telephone and you wouldn't have — and you would not have seen him?

A. I didn't see him.

Q. You're sure about that?

A. I'm sure.

Q. You're not saying he wasn't there, you're just saying you didn't see him there?

A. That's right.

[947] Q. Okay. Come down.

Redirect Examination

By General Crockett:

Q. Would you have seen him, had he been there?

A. Yes, I would have.

Q. All right, sir.

* * *

Recross Examination

By Mr. Stuart Hampton:

Q. Do they have a juke box in the Arcade?

A. Yes.

Q. Do you know if it was playing that night?

A. I don't think it was. I can't remember if it was cause . . .

[975] Q. Was there a lot of noise in the pool hall?

A. Pretty much.

Q. If you're gonna use the telephone, would you have to step in the little office there behind the door to use it?

A. I'd say so. It's right on the other side of the wall.

Q. If Ken Proffitt testified here during this trial that he was there with Joe Street, and he shot pool with you that night, would you deny that?

A. No, I wouldn't deny it. I don't know if I shot pool with him.

Q. All right, come down.

Redirect Examination

By General Crockett:

Q. Would you deny that — let — let me stop — would you deny that the defendant, Joe Street, was there?

A. Well, I didn't see him.

Q. And this little office or — or offset, is there an office with a door to it that you go in to talk to, or just a little corner?

A. Just a little corner.

Q. Can you see the corner from where you were shooting pool?

A. Yes.

[976] Q. So anyone talking on the phone would have been open to view to other people in the pool hall?

A. Yeah.

Q. And you would have noticed him had he been there?

A. Yes.

Q. All right, sir.

Recross Examination

By Mr. Stuart Hampton:

Q. Let me ask one other question. If I asked you to name everybody that was at the pool hall that night, do you think you could?

A. No.

Q. Come down.

TESTIMONY OF MIKE PUCKETT

[977] Direct Examination

By General Crockett:

Q. You are Mike Puckett, you have previously testified in this case as a defense witness?

A. Yes, sir.

Q. Mr. Puckett, calling your attention to the night of 26 August, 1981, did you have occasion to be at Al's Pool Hall in Hampton, Tennessee, on that evening?

A. Yes, sir.

Q. What were the hours that you were present there?

A. From about 7:00 — I was down there at 7:00 and then I left and then come back about 7:30, and I was there 'til about 8:00.

Q. While you were there did you talk on the telephone?

A. I could have, I don't remember.

Q. Do you recall talking to Rebecca Ann Hopson?

A. I could have. They call down there all the time. I'd talked to them before.

Q. Do you recall having a conversation and turning the telephone over to Joe Street?

A. I don't recall.

[978] Q. What time, if you were there that night, the night of the murder of Ben Tester, what time did you leave that pool room?

A. Eight o'clock.

Q. Did you ever return?

A. No, sir.

Q. How do you know that it was 8:00?

A. 'Cause when I got home it was about five after, 'cause I had to get up the next morning and go to work, so I got home early.

Q. Why did that make a particular impression on you?

A. 'Cause the next day when I went down there to work we went up there and seen that man hanging in the tree, and I said, "Well, I'm going to make sure I know where I was at." And I've wrote everything down at the house I've got from where I was all day that day.

Q. Did you actually write down that you were home at 5:00 — or, at five after 8:00?

A. Yes.

* * *

[979] * * * GENERAL CROCKETT: After you left and went home that night did you ever return back to the pool room after 8:05?

A. No.

Q. And, so, if you talked to any — if you had any conversation that night on the telephone or had any conversation with Joe Street it occured on or — at or before 8:00?

A. It was five 'till — 'till 8:00.

Q. All right. Did you see Joe Street there at 8:00?

A. When they was — when I was walking out leaving I saw him and Jeff Causby and Ken Proffitt coming in.

Q. Coming in.

A. Yes.

Q. Did you have a conversation with them?

A. I — Ken said, "What you doing?" And I said, "Nothing." I said, "I'm going to go home and go to work tomorrow."

[980] Q. All right, sir. So you — do you recall if you had this telephone conversation on that night or some other night?

A. I can't recall.

Q. But any conversation that you had personally or by telephone was before 8:00?

A. Yes, sir.

Q. All right, sir. On the night of — of August 26th?

A. Yes, sir.

Q. There's no doubt in your mind about that?

A. No doubt.

Q. All right, sir.

Cross Examination

By Mr. Stuart Hampton:

Q. Did you see Lester Rainbolt there that night?

A. Yes.

Q. Did you see Gary Farmer there that night?

A. Yes.

STUART HAMPTON: You may come down.

Redirect Examination

By General Crockett:

Q. What were they doing?

A. They were shooting pool with Ken. Gary was.

Q. With, who?

A. Ken Proffitt.

TESTIMONY OF RICK MORRELL

[982] Direct Examination

By General Brown:

Q. State your name and occupation to the Court, please.

A. Rick Morrell, I'm a teacher with Sullivan County schools.

Q. And are you also employed by any police agency at this time?

A. I'm a Reserve Deputy with Sullivan County, at the time of the Tester murder, I was a Deputy Sheriff Investigator for the Carter County Sheriff's Department.

Q. In your capacity as a Deputy Sheriff for Carter County back in August of last year, did you have an occasion to interview the defendant in this case, Harvey Joe Street, on or about the 28th day of August that year?

[983] A. Yes, sir.

Q. Let me show you this statement and ask if you recognize it?

A. Yes, I do.

Q. What is that piece of paper?

A. It is a statement from the defendant, Harvey Street, that we started to take on Friday the 28th.

Q. We offer this an an exhibit.

THE COURT: Exhibit number 46.

(Exhibit number 46 marked and filed.)

Q. What were the circumstances of your taking this statement from Harvey Joe Street?

A. This was the first time I took an active part in the investigation and Agent Collins and myself took Harvey Street upstairs and began to take a statement — began to take this statement.

Q. Where was Joe Street? How did you, you know, start your questioning? What was he doing or so forth? How did — how did you come to be talking to him?

A. He was at the Sheriff's Department when I arrived.

Q. Do you know whether or not he was in custody at that time?

A. I do not believe he was.

[984] Q. And, what did you and Agent Collins do?

A. We took Mr. Street upstairs to the Sheriff's Office and began to take this statement.

Q. Who — who was present during the taking of that statement?

A. Mr. Street, Agent Collins and myself.

Q. Where was George Papantonio, the Sheriff?

A. He was not with us at the time of this statement. I believe . . . (simultaneous speech).

Q. Would you read — go ahead.

A. I believe he was downstairs.

Q. Would you read for the Court and jury the statement that this defendant made to you two (2) days after this murder?

[Objection made and overruled.]

Q. Read the statement to the Court and jury, please.

A. "On Wednesday, August 26th, 1981, Clifford and Glenida Peele came to my residence in Hampton. This was approximately **[985]** 8:00 o'clock to 8:30 A.M. We, Clifford, Glenida and me, sat at the house and listened to the stereo. We did this for approximately fifteen (15) minutes while I was washing my hair. From my house, we went directly to the pool hall in Hampton, Tennessee, located in the old Dyer's Market Building. We arrived at the pool hall at approximately 9:00 o'clock. Clifford Peele and I shot two (2) games of pool while Glenida waited inside the pool hall. Clifford Peele owns a '79 or '80 Chevrolet, El Camino, gray in color with black stripes across the doors. This is the vehicle the three (3) of us went to the pool hall in and it was also the vehicle we left in. Clifford, Glenida and I left the pool hall at approximately 9:45 to 10:00 o'clock. From the pool hall, the three (3) of us went back to my residence. There I ate some breakfast; this was approximately 10:05. Clifford and Glenida had left by this time and had stayed only long enough to let me out at my house." And at this point, the statement was discontinued upon advisal of the defendant's attorney.

Q. How was it that it was discontinued? Why — why did you stop taking this statement two (2) days after the murder?

A. We received a phone call from Mr. Hampton indicating that he wanted no statements taken.

Q. And as soon as you received that phone call — well, **[986]** from which Mr. Hampton?

A. Stuart Hampton.

Q. As soon as — what did he tell you?

A. He said to discontinue it unless he was there.

Q. And, so what did you do?

A. Discontinued the statement.

Q. During the — the time that this statement was taken, did the Sheriff, George Papantonio, tell the defendant that he — a lawyer wouldn't do him any good?

A. Not to my knowledge. Not in my presence.

Q. Did he — did the defendant in this case ask to have an attorney present?

A. No, sir.

Q. Did George Papantonio, in the taking of that statement, tell this defendant anything to write down there?

A. No, sir.

Q. Did Sheriff Papantonio tell him to say that he'd been to a pool hall?

A. No, sir. He wasn't present when we started this statement.

Q. Did Sheriff Papantonio tell him to — to say it was an El Camino of a certain year?

A. No, sir.

[987] Q. Was he threatened at all by Sheriff Papantonio during the taking of that statement?

A. No, sir.

Q. Was he threatened by anybody else in the taking of that statement?

A. No, sir.

* * *

TESTIMONY OF SHERIFF GEORGE PAPANTONIOU

[1005] Direct Examination

By General Crockett:

Q. You are Sheriff George Papanonious, Sheriff of Carter County, Tennessee?

A. Yes, sir, I am.

Q. You have served in that capacity for how many years?

A. Just about six years.

Q. You have been twice elected as Sheriff of Carter County?

A. Yes, sir.

Q. Sheriff, calling your attention to the 26th of August and 20—well, first to the 27th day of August, 1981, did you become aware on that day that Ben Tester had been murdered at his home?

A. Yes, sir, I had.

[1006] Q. When did you become aware of that?

A. Around 3:30, we received a call and I had dispatched a couple of units to secure the area, and then shortly after that I had arrived. I had called for Lynn Brown to be there and asked that TBI Collins to come in and assist.

Q. All right, sir. And in the course of your investigation, did you have or cause to have an interview conducted of the defendant in this case, Joe Street, on the 28th day of August, 1981, the following day—the day following the discovery of the body of Ben Tester?

A. Yes, sir.

Q. Prior to that interview with—with the defendant, Joe Street, did you have any conversation with him?

A. No, sir.

Q. Did you threaten him, promise him—threaten him in any way?

A. No, sir, I just—when we was taking everybody in for—just to find out where they—they had been the previous days involving especially on the 26th, and probably we had something like 30 people in one day taking statements from them. **[1007]** And, as Joe came in I told him what we wanted, and Joe Morrell came—Rick Morrell came in and I instructed him to stay with Don Collins and take his testimony, and I was proceeding on somebody else that was coming in at that time, to see that they were going to be interviewed or see what people I had left.

* * *

[1009] *** Q. All right. Now, did you next question him on September 11th, 1981? Did you cause a statement to be taken from him on that date at the hospital where his father was injured?

A. Yes, sir.

Q. All right. Prior to that statement had you taken any other statements from him? I'm talking about between the 28th when —when Officer Morrell interviewed him until the 11th, had you taken any other written statements from him?

A. No, sir, I did not.

Q. All right, do you know if any of your officers did?

A. No, sir, they did not.

Q. All right. On that date did you take a statement from Harvey Joe Street?

[1010] A. Yes, he wanted to talk to me without the presence of his mother. I had called Judge Ray. I had called yourself, and his father was coming down to my office to meet us at that point. While his grader that he was driving failed, the brakes or the engine stopped and he didn't have no control over the grader, and almost fell on top of him. It was not a major in-

jury, and upon the doctor's recommendation we still went to the office and we was allowed to talk to Joe Street in front of the presence of his dad.

Q. Well, you said to the office, you mean to the hospital?

A. Right, I'm sorry.

Q. He was in a hospital room at that time?

A. Right.

Q. All right, sir. And, at whose request did—was this statement taken?

A. Joe Street's request.

Q. How had he made known to you that he wished to make a statement concerning Ben Tester?

A. He wanted to—Joe was emotional at that time, and every so often he would send me a note. It was bothering him and he wanted to get it off his chest, he said, "But I don't—I can't tell you in front of my mother. I can tell in front of my dad." And, I had called the judge and I got you and on his **[1011]** request we went and talked to him and we advised his dad of—of what we wanted to do and he agreed to it. He just asked for him to tell the truth.

Q. All right, sir. And did he make a statement at that time?

A. Yes, sir, he did.

Q. And what did he say?

A. He told us that he knew about the hanging. He did not have any direct involvement with the hanging, but he was used as a lookout from the Switch Back, and he was supposed to blow the horn in case of law enforcement would be coming towards the Ben Tester residence.

* * *

[1012] *** Q. After making the statement on September the 11th, 1981, in which he admitted that he did not directly par-

ticipate but had knowledge and—and acted as a lookout, did he make a third statement to police officers on the 17th of September, 1981?

A. Yes, sir, he did.

Q. All right. That statement has been introduced into evidence here today?

A. Yes, sir, it has.

Q. And, in that statement, first of all, was he in custody at that time?

A. No, sir, he wasn't.

[1013] Q. How did he come to make that statement?

A. He had gone to his grandmother's house, and because of a previous statement that he had given us some pressure was put on to him. And he called, he wanted to talk to me, and Lynn Brown. And I called Judge Ray and we all met in my office. At that time...

Q. Did he voluntarily come to the sheriff's office?

A. We had—we had to go and pick him up. He...

Q. At—at whose request did—did you go to pick him up?

A. Joe's request.

Q. And, how did he communicate that request to you?

A. He called.

Q. By telephone?

A. Yes, sir.

Q. And you sent a deputy?

A. Yes, sir.

Q. All right, sir, was he brought to the jail?

A. Yes, sir, he was.

Q. Did his father come to the jail?

A. Yes, sir, he was (sic).

Q. Did his mother come to the jail?

A. Some time later, maybe an hour and a half, maybe less, **[1014]** after the statement was in process.

Q. All right. What time of the day or night did—was he brought there to the jail?

A. Somewhere around 7:00. I know I had to wait for Agent Collins and Agent Huckaby to arrive to my office.

Q. Did Lynn--did Lynn Brown come to that office?

A. Yes, sir.

Q. Attorney General Lynn Brown?

A. Yes, sir, he was.

Q. All right, sir, after Agent Huckaby and Agent Collins and Assistant Attorney General Brown arrived, or prior to that time did you have any conversation with—with the defendant?

A. He told me that if he could stay out 'til the rest of the—the rest of the people were arrested, he'll give me a statement. And I told him the only thing I can do is discuss the situation with Lynn Brown and—Assistant Attorney General and Judge Ray. And I told him whatever they decide to do would be fine with me. And he was on an existing bond for the burglary charges.

Q. He was out on bond at that time?

A. Yes, sir. And, then I called Don Collins 'cause I wanted to have the same agent that was taking all the other confessions, wanted him to take this statement also. And, when **[1015]** Don Collins came in with his supervisor...

Q. His supervisor is Agent Huckaby?

A. Yes, sir.

Q. All right.

A. I stayed in the presence of everybody at that time. And, he was reading his rights, his father was there. His father several times requested that his mother be brought up—up there, but Joe reluctantly refused. He didn't want to tell it. And Mr....

Q. He did not want to tell it in front of his mother?

A. Right. And Mr....

Q. Did you at any time refuse to have his mother brought there at his request?

A. No, sir.

Q. Did any of the other officers in your presence?

A. No, sir. In fact, they were standing downstairs in my other office, and they had coffee, making them comfortable to (indiscernible) through the statement.

Q. All right, sir. Did you promise Joe Street anything?

A. No, sir, the only thing I promised Joe Street in the presence of Lynn Brown and Judge Ray, that if he would give us a truthful testimony of the effects of—of the events that took place on the 26th that I would ask the Attorney General's **[1016]** office to give him any accommodation that it would—it would be possible by the Attorney General's office. And that was the agreement that we would—we had made.

* * *

GENERAL CROCKETT: All right. Did he confess to you to being present and detail certain facts concerning the murder of Ben Tester?

A. Yes, sir, he did.

Q. Did you at that time suggest, lead, or recommend **[1017]** any statement that he make, as he has said here today?

A. I said this, I says, "Joe, you're not telling us the truth." I said, "You're taking everybody's time. This is about the second or third time you've been talking to us. If you're not going to tell the truth I don't want you taking these people's time or mine." I says, "Now, you know a man's been murdered and we need a statement." And he broke down crying. We recessed at that point. He got something to drink, I stepped out of the office and I stayed for most of the statement after that out of the office. I made a copy of some other statements for Attorney General Brown, and I returned back shortly before the statement was concluded. I was present there where Judge Ray stayed in the office, Lynn—and his father stayed at the office at all times when he was giving the statement. And we went back in there, he read the statement back to him in front of Jessee—Judge—Juvenile Judge Jessee Ray and Lynn Brown and...

Q. Who read the statement back to him?

A. Don Collins did—read it to him. He...

Q. Did he make corrections in that?

A. He made corrections on there.

Q. Did he initial those areas that were struck over?

A. He most certainly did. And I witnessed him doing it **[1018]** and I signed as a witness at the end with Agent Collins and Agent Huckaby.

Q. Did you—did you exhibit to him any photographs during this interview of Ben Tester's body?

A. Not at this time. At a later point he wanted to see some of them.

Q. Did you show him at a later time, after he made this statement...

A. Yes.

Q. ...photographs of Ben Tester's body?

A. Yes. Yes.

Q. Before this statement did you tell the defendant, Sheriff,

that Ben Tester's shirt had been ripped?

A. No, sir.

Q. Before this statement did you tell the defendant that Mr. Tester had been hanged with a double loop around his neck?

A. No, sir.

Q. Did you tell him before this statement or did you show him any photographs indicating that the screen had been cut?

A. No, sir.

[1019] Q. Did you, before he made this statement, make any reference to the gag being torn from a white sheet that was in the—side the (sic) Tester home?

A. No, sir.

Q. Did you at any time tell the defendant prior to this statement that the wallet of Ben Tester was found in the right front bedroom . . .

A. No, sir.

Q. . . .of that home? Did you at any time tell him that Eugene Montgomery had climbed into the apple tree to tie the rope . . .

A. No, sir.

Q. . . .with which Mr. Tester was hung?

A. No, sir.

Q. Did you at any time tell the defendant or show or give him any information that money had been taken from the wallet of Mr. Tester? That all the money had been taken from that wallet?

A. No, sir.

Q. Did you at any time tell him that a struggle had occurred in the livingroom of that home which buttons were torn from the shirt of Mr. Tester and found on the livingroom floor?

A. No, sir.

[1020] Q. Did you at any time tell him or show him photographs indicating that Mr. Tester's home had been ransacked and searched by the intruders that—that came into his home?

A. No, sir.

Q. Did you at any time tell him that shirts belonging to Mr. Tester had been taken and were missing?

A. No, sir.

Q. Did you at any time tell him that phone lines had been cut coming into the home?

A. No, sir.

Q. Did you at any time let him read Cliff Peele's statement or did you read Cliff Peele's statement to him?

A. No, sir. I did tell him that I had a statement from Clifford Peele.

Q. Did you have Clifford Peele's statement in your possession?

A. Right. And I wanted him to tell me the truth.

Q. Did you ever allow the defendant to read that statement?

A. No, sir, I showed him Clifford Peele's signature.

Q. All right, sir. Did you tell him any of these facts that I have asked you about that he included in his statement?

A. No, sir.

* * *

[1022] *** A. And, then, I got another statement on—two days or so before—well, have it (indiscernible) on the 27th, I think, is the date recorded, but it was a couple of days before he took—probably on the 30th that he took a statement. But he came down to give me a statement. He was—he'd been sending

me several notes lately. As—as to the—the date of the trial was approaching, the more excited...

GENERAL CROCKETT: Now, you're talk—are you talking about the date of the hearing on—there was a hearing that we had concerning matters of—of admissibility on July the 2nd?

A. On the 2nd of July, right.

Q. Now, at some time a few days prior to that did you take a statement from the defendant?

A. He came down...

Q. How did he happen to come down?

A. He requested...

Q. Was he in jail at that time in your jail?

A. Right. He requested three times, and Don Shepherd, a **[1023]** captain with...

MR. STUART HAMPTON: In—in order for me to understand this would he ask him to state the dates he's talking about?

THE COURT: Be more specific as to which date.

GENERAL CROCKETT: Specifically the date that I have on the statement is the 27th of June.

A. Twenty-seventh (27th). I feel that—we was trying to recollect the exact date, because I had testified on the suppression hearing that it was two days prior to that suppression hearing. And my memory would serve me best at that point. 'Cause I—I have several things that I have to work with.

Q. All right, sir.

A. All right, when we...

Q. It was some few days, which the 27th would be a few days preceding the 2nd.

A. When we was instructed to reduce it to writing then I think it was—then we thought it was as close to it as the 27th. All

right, I reduced—I reduced it in writing. That night he sent me a note, like he always has in the past, and Donnie Shepherd brought it down, which is a captain with my sheriff—with the Carter County Sheriff's Department. And he **[1024]** told me that, "Joe Street says it's very important that he talks to you, and he wants to talk to you in my presence or in John Hanson's presence."

Q. Now, these are both deputy sheriffs that work for you?

A. Both of them are captains with the Sheriff's Department in Carter County.

Q. All right. Did you bring Joe Street down?

A. I told them to bring Joe Street down, and at that time Commissioner Cobaugh came in.

Q. Bob Cobaugh who testified here earlier?

A. Yes, sir.

Q. All right, sir, go ahead.

A. When he come down he says, "George, I don't want to have to take the chair. What will the State give me if I was to turn evidence in the State's behalf?" I told him, I says, "Joe, you was offered that before." I says, "I don't know what is going to happen. You got an attorney." Both of my captains had advised him of his rights, and I told him that—"You want me to call Lynn Brown to see what—what was the shortest thing he could get?" And I—I let him sit down, and I called Lynn Brown. And at that time he said, "I don't want Donnie in here,"—Shepherd—says, "I want to talk just to you and Hanson." I said, "Well, it would be to your interest to have **[1025]** a Judicial Commissioner because he's not one of us, so, you know, you won't have no worry that—at this, you know, he would be looking for your interest." So he says, "That'd be all right." Says, "I know Mr. Cobaugh. Let him stay here." So, I called Attorney General Lynn Brown. I told him that Joe was wishing to make a statement with or without his lawyer present.

And he knows he's 18, he knows he has an attorney, but he still is willing to make a statement that night and turn State evidence in return for what the Attorney General's office could give him in consideration for his truthful testimony here. So he says, "Well, with the attorney there," said, "I—they're going to have to get it tomorrow." Says, "If they want to do that," said, "we'll talk to his attorney tomorrow and we'll get General Crockett and we'll take it from there." So I advised Joe what Lynn was saying, and he—he wanted to talk to him and I says, "Attorney General, he wants to talk to you." And he said, "Well, if he wants to talk to me I'll talk to him." Said, "I'd rather not talk to him, but if he insists I will talk to him." So I let...

Q. All right, sir.

A. ...Lynn talked to him at that time.

Q. So he had a conversation with Lynn Brown?

A. Right.

[1026] Q. After that conversation what, if anything, did Joe Street tell you?

A. He said, "I can tell you just about what you want to know." I said, "Well, let me give you your rights again." I says, "And tomorrow we can reduce it in writing. I'm not going to reduce nothing 'til the Attorney General and your lawyers get together. I says, "If you want to," I says, "if you insist to give me a statement I'll call your parents tonight and bring them down here and see if they want to dismiss your lawyer, even though, you know, you're 18 and you have the right to dismiss him," I said, "I'll call your parents." He says, "No, I don't want my parents called." He said, "He's got to get up early in the morning and I'm not going to bother calling them tonight." I says, "Well, that's fine." Says, "Can I have another cup of coffee and a cigarette?" I says, "Sure." And he continued on, he says, "I can testify about everybody." He said, "I—I just don't want to have to take the stand against my uncle, Kelly

Banner." And, he started from there. And, I says, "Joe," I says, "from what you have told us before and what you know now from the different testimonies," I says, "do you have any disagreement with the amount of people that would have been in—in the yard of Ben Tester?" He says...

[Objection made and overruled.]

[1027] *** A. So, he named Cal Hazelwood, Jeff Ramsey, that he was supposed to take a note back to the house. He doesn't know how he took it back. But he knows that he was the one that was supposed to take a note back. And I asked him, I says, "Can you identify the truck that you used that night?" He says, "Yeah, I can identify the truck." So, I took him to the adjoining room, which is a garage. I get—and says, "This is the same truck, but it's not—it's not exactly the same as it used to be."

GENERAL CROCKETT: And, what did you say about that truck?

A. That it was the identical truck that was used to hang Ben Tester. He showed us where he was at and he gets emotional every time he comes to where his Uncle Kelly, according to his testimony, told him to put the second loop around Ben Tester's neck.

* * *

ARGUMENT AND RULING ON ADMISSIBILITY OF CLIFFORD PEELE'S CONFESSION

[1043] July 26, 1982

THE COURT: Bring Mr. Street in, please. Any matters to be taken up before the Jury's brought in?

GENERAL CROCKETT: Your Honor, we had announced that I had no further questions of the sheriff. I have just one other series of questions, if I may, before turning the sheriff over to cross-examination by the defense.

THE COURT: All right, but let's...

GENERAL CROCKETT: And this is—this is a matter, too, Your Honor, that perhaps we should take up outside the hearing of the Jury. I intend to offer through the sheriff the statement of Clifford Peele. Not for the purpose of—of the truthfulness of the —of the facts contained therein, but to show the sheriff had certain information—or, did not have certain information which the defense—or the defendant allows or represents that was furnished him in his statement. In other words, the defense, as I understand it, Your Honor, is simply saying that the sheriff furnished him the facts of this statement. By introducing the statement of Clifford Peele it will show that this was the only statement that the sheriff had at that time, and that it was a statement that did not contain all of the facts furnished by the defense. Or by the defendant in his statement on the 17th. This is the statement which was taken on the 16th. And I think that it's admissible for that purpose, Your Honor.

[1044] MR. STUART HAMPTON: Your Honor please, we would object to that on the grounds that any facts contained in that statement of Mr. Peele's would be, number one, proof in chief, and the other would be hearsay.

GENERAL CROCKETT: We're not offering...

MR. STUART HAMPTON: If they want to prove any—if they want to use any of the facts in that statement they can call Mr. Peele.

GENERAL CROCKETT: Your Honor, the defense was trying to get it in earlier.

MR. STUART HAMPTON: But you wouldn't let it in on the grounds of hearsay.

GENERAL CROCKETT: It was hearsay under those circumstances because it was to prove the facts that were alleged therein, Your Honor. This is to simply show what facts the sheriff had in his knowledge at that time. The defense has raised this issue and they have opened the door to permit us to do

this. We are not introducing this statement for the facts contained therein, to prove the facts contained therein. Simply to show that the sheriff could not have had knowledge of certain items that were contained in the defendant's statement on the 17th because on the 16th when Clifford Peele gave him this statement those facts were not in that statement. The sheriff could not have known that, as the defendant allowed—represents. The statement is hearsay only when it's offered **[1045]** for the purpose of proving the facts contained therein. We're not offering it for that purpose.

MR. STUART HAMPTON: That's what they're trying to do, Your Honor, only—only they're trying to get it in under the guise of another form of evidence. That's their real purpose.

GENERAL BROWN: Your Honor, our problem is this...

MR. STUART HAMPTON: You've got a problem, that's right.

GENERAL BROWN: ...the defense—defense—the defendant, this young man in his testimony, says that the sheriff had him read over this statement three times before he came into this room and started giving his confession, and that he got every bit of that information out of that statement of Clifford Peele's, the reading it over, and then he goes in and spits it right back out. The State will introduce it to show that this is impossible that this man is lying when he says that, because there are things in Clifford Peele's statement—there are thing in his statement that Clifford Peele did not mention, whatsoever, in any form or fashion. So that—that he could not have done as he said, that is, just parrot or repeat what he had read in Clifford Peele's statement. And, as such, Clifford Peele's statement is relevant for what it contains. For the fact it was said, not for the truth therein, and that makes it outside the hearsay **[1046]** rule. If it's admissible for any reason other than the truth contained therein, and this is very relevant, the issue of whether he could, in fact, have done as he said and just parrotted and repeated this confession, then it comes in.

MR. STUART HAMPTON: If Your Honor please, you have ruled on this all the way through that—this trial. We have tried to put in things, and you've consistently ruled that it was hearsay.

MR. BILL HAMPTON: Your Honor, let me make this observation, Mr. Brown's made a misstatement when he states to you that this young man stood on the witness stand and said simply that he copied down exactly verbatim what Mr. Peele had said or the sheriff had read to him. He also said that the sheriff told him what to say, and the sheriff interjected things that he should say. So, when Mr. Brown says that this was just a recital of Mr. Peele's confession verbatim, that's not the testimony on this stand from the defendant. There was a mixture in it when Mr. Crockett was cross-examining.

THE COURT: All right, does either side have anything else they'd like to say? I believe if I do my research, if I can find it, this involves the definition of hearsay, and I believe, as I recall, there's 150-some exceptions to the rules and exceptions to the exceptions, and and I'm going to take a short recess. I know everyone's anxious to get the—get into this trial, but I'm going to take a short recess back here someplace, **[1047]** and then I'll come out and rule on it just—just as soon as I can. So, let's take about a ten minute recess.

(Court in recess.)

THE COURT: After reading Section 47 of Paine, Section 47 on Page 48 to determine whether such a—oh, pardon me, General, I thought you were in here. After reading Section 47 of *Tennessee Law of Evidence* by Donald Paine on Page 48 there's two questions that one must ask: 1) Does the purpose of the offer require out-of-court statement to be taken as true; 2) Would cross-examination of the defendant be helpful? If—if the answers to both questions are affirmative, the statement is hearsay and inadmissible, unless a hearsay exception applies. In the case of a written document, and so forth... After carefully considering this I believe it would be best to disallow this testimony.

GENERAL CROCKETT: Your Honor...

GENERAL BROWN: Your Honor, would—would you look at those—those two questions again that—the first question, whether it—is it a matter that is true. Read...

THE COURT: Well, the answer to that is probably...

GENERAL BROWN: What page are...

THE COURT: It's on Page 48, about a third of the way down. The second question, though: Would cross-examination of the defendant be helpful? Cross-examination of the declarant be helpful? Certainly it would be helpful to—probably to **[1048]** both sides.

GENERAL BROWN: All right...

GENERAL CROCKETT: Your Honor...

GENERAL BROWN: ...the book says, "If the answers to both questions are affirmative, the statement is hearsay and inadmissible." Well, we look at the first question: "Does the purpose of the offer require the out-of-court statement to be taken as true?" The answer to that one, if the Court please, is in the negative. It's, "No" We are not saying that Clifford Peele's statement is true.

MR. BILL HAMPTON: That's what they're saying, Your Honor.

GENERAL BROWN: The reason to introduce it is because it was made. For the fact that it was made and they contend that it was given to the defendant. It—it doesn't matter whether it's true or not. The issue is whether this man read over it and then gave it back to the sheriff and Agent Collins in taking the statement. So that it is...

GENERAL CROCKETT: Whether it contains all the facts, Your Honor, that—that this defendant has parrotted back to the—to the—he says he parrotted back to the sheriff. That this is—he is maintaining, Your Honor, that his information came

from this statement. That the sheriff took this statement, gave him that information, then he gave that information back to the sheriff. I think it's—it's absolutely **[1049]** material for that purpose, Your Honor. Not as to whether Clifford Peele committed the crime or not. We're not offering that.

THE COURT: What about the Bruten matter? This—this might be true if the declarant were not—it might be admissible if the declarant were not a indicted (sic) co-defendant.

GENERAL BROWN: The Bruten problem is there, Your Honor. And it would have been there if we had tried to introduce this statement in the State's proof in chief.

GENERAL CROCKETT: We did not...

GENERAL BROWN: Which we did not. In the State's proof in chief, if there had been an objection to this the statement would have been properly excluded, because it would have been hearsay. But, the defense has raised this issue. Things have changed. The issues have changed. When the State was putting on its proof in chief the issue of whether or not this defendant read the statement and then parrotted it back, that issue was not present. But, the issues has been raised by the defense, if the Court please, and the law is that if it is admissible for—for any purpose, then it comes in. And, this is a relevant issue. They—they've raised the issue of whether—they've raised the issue that—that this young man was—read this statement three times, and then walked into a room and gave a confession. And, as such they have made **[1050]** relevant by their own proof the fact that this statement was made, that this is the statement that this man read, they say, before he came in to confess. So that the contents of the statement is relevant, regardless of whether it's true or not. If he had been handed the King James Version of the *Bible* and then confessed to—to some crime that appears in—in Deuteronomy we could introduce that part of the *Bible*. Not for the fact that it's true, but because he read it.

THE COURT: Does the defense have anything else they'd like to say?

MR. BILL HAMPTON: Your Honor, they have Clifford Peele here. He's the best evidence. We—we cannot cross-examine him if they're going to read his statement into the record. How can we cross-examine that?

GENERAL CROCKETT: We're simply—the—the issue is—is if the facts—all the facts that this defendant gave back in the statement on the 17th were contained in Clifford Peele's statement on the 16th, which they were not. It is material for that reason and for that reason only. The sheriff could not have furnished him the—the words out of the mouth of this defendant were, "These are the statements that the sheriff furnished me." Well, the sheriff didn't have this information because he had one confession, Your Honor, and that was the confession of Clifford Peele taken on the 16th. And I think that it's absolutely vital to the State's case. I think **[1051]** it is—it is an exception and—I don't—it's not hearsay. It's not an exception to the hearsay rule, it is not hearsay. We are not offering it for the truth of Clifford Peele's statement, we are offering this statement simply to point out that there are additional facts, many additional facts, seven or eight additional facts, beyond that which Clifford Peele put in his statement that the defendant has put in his the following day. Facts that are corroborated by the on-scene investigation. There's not one mention in this statement of Clifford Peele's that shirts were taken from the house of Ben Tester.

THE COURT: See, I—I want to ask...

GENERAL CROCKETT: And a number of other...

THE COURT: ...General Brown a few questions. Maybe then it is admissible—admissible as far as this, but the Bruten problem still bothers me.

GENERAL CROCKETT: The Bruten problem would be applicable if we were offering this on our—our case in chief. You would be absolutely correct. But when the defendant opens the door by saying that, "The sheriff furnished me this statement,

had me read it, and then I gave it back to him," then they have waived that Bruten rule, Your Honor. It—it no longer applies.

THE COURT: All right, I've changed my mind. We'll allow it. Any other matter to be taken up before the Jury's brought in? Bring the Jury in, please.

[1052] GENERAL BROWN: Your Honor, we would ask that—that the Court caution the Jury that this statement is being admitted...

THE COURT: Not for the truthfulness of it but for...

GENERAL BROWN: ...not for the truthfulness of it but for the fact that it was made.

THE COURT: All right.

MR. BILL HAMPTON: Your Honor, we...

GENERAL BROWN: For the contents.

MR. BILL HAMPTON: ...we renew our same objections, Your Honor.

THE COURT: Objection overruled.

* * *

CONTINUED TESTIMONY OF SHERIFF GEORGE PAPANTONIOU

[1053] Direct Examination

By General Crockett:

Q. Sheriff Papantoniou, I have just a few questions before the defense will cross-examine you. First of all, did you at any time during the taking of the statement of Joe Street on the 17th of September, 1981, threaten to send Joe Street to the penitentiary?

A. No, sir, I can't send nobody to the penitentiary. Only the Court can do that.

Q. Did you promise to send him if he did not make a statement or put him—make him a trustee if he did make a statement?

A. No, sir, I did not promise to make a trustee out of him. I told him that there is a possibility with the charge at hand that the chair could be imposed for the truthfulness of his statement.

Q. That was the law at that time?

A. Yes, sir, it was. And I told him, you know, whenever he tells the truth the Court takes certain considerations. It's **[1054]** one thing to do wrong and it's one thing to want to do something about it. And I—and I told him that I would talk to the D. A. and in front of his presence I told him that I would ask the D. A. to give him any consideration that the Attorney General's office has in recommending anything to the—to the Court for his truthfulness.

Q. Did you tell him that he could go home if he confessed?

A. No, sir, the judge was there and he wanted—he asked if he could go home, due to the seriousness of the case and other people was going to be arrested. After concurring with the Attorney General and the judge we decided to let him go on the same bond as he was at that time until the time we come in to arrest everybody collectively, because as a rule when you arrest one person and charge them you have to hunt the co-defendants all over the United States and usually they find out that a warrant will be issued towards them and it's hard for—for law enforcement and the taxpayer to chase all over the United States to—to bring these individuals back. So, for that purpose...

Q. You mean, if one—one is arrested in a multiple-defendant case that others will flee?

A. Well, being under the—I have been under a court decision where every record that I have is public. And, once **[1055]** that a statement would be obtained from a—you know, a reporter will report...

Q. Would you—excuse me, George, you're not responsive to my question. My question is, are you saying that you allowed him to go home so that it would not tip off the other defendants who might flee?

A. Well, we was...

Q. Answer that with a 'yes' or 'no', and then explain your answer.

THE COURT: Answer 'yes' or 'no', if you can.

A. Yes, we allowed him to go home because he was already on a bond and we did not want to interfere with further investigation on other defendants pending to arrest them, so we collectively arrested about six—four or five at one time.

Q. And how long was it after you allowed Joe Street to go home after making this statement before he was arrested and placed back in jail on the charge of First Degree murder?

A. I believe it was around five days.

Q. Okay. Were other defendants arrested at that time as well?

A. Yes, sir.

Q. All right, sir. Did—was Agent Huckaby who is now present in court, TBI Agent Huckaby, was he present during **[1056]** the taking of this statement?

A. Yes, he was.

Q. And, he was in a position to hear any conversation that went on between you and...

[Objection made and overruled]

GENERAL CROCKETT: Your Honor—all right, go ahead.

A. Agent Huckaby was there from the beginning of the statement to the end of the statement.

Q. Now, at the time that you took this statement from Joe Street did you—had you obtained a statement from Clifford Peele, a co-defendant in this case?

A. We had a statement from Clifford Peele the day before.

Q. All right, sir. And, at that time the defendant has—has maintained that you furnished him a copy of that statement or let him read that statement prior to his confession on the 17th, the next day. That you allowed Street to read Peele's confession. Is that correct?

A. That's not true.

Q. All right, sir. Do you have—I have what has been marked previously as Exhibit 42, which is both a handwritten and a typed—later a typed copy of the confession of Clifford **[1057]** Peele. Do you recognize that?

A. Yes, sir, I do.

Q. All right, sir. And that—that is a statement Clifford Peele made on what date?

A. On the 16th.

Q. On the 16th. And the first part of this statement is the handwritten copy. Who wrote this down?

A. Don Collins wrote that down.

Q. All right, the second part...

A. In the presence of Huckaby, sometime in my presence, and sometime Lynn Brown's presence and Judge Ray's presence, and Mr. Joe Street and his father's presence.

Q. All right, sir. And, you had it later transcribed and typed up? Or the TBI did?

A. We—we was working together. I don't know if it was my typewritten statement or if it was—yeah, I believe probably we did that.

Q. All right.

A. And...

Q. So, that's the typewritten version of the same statement, just easier to read?

A. Yes, sir.

Q. All right. Would you offer this statement that was **[1058]** taken from Clifford Peele on the 16th as an exhibit to your testimony?

A. Yes, sir, I will.

MR. STUART HAMPTON: We would object to that, if Your Honor please, on the same grounds we made before.

THE COURT: All right. Objection is overruled, but ladies and gentlemen of the Jury, I want to explain that the Court is—is allowing the introduction of Mr. Peele's statement not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only as to other proof that might have been offered.

GENERAL CROCKETT: Sheriff, are you familiar with this statement?

A. Yes, sir, I am.

Q. Sheriff, in that statement does the defendant Peele admit to being present...

MR. STUART HAMPTON: No, we object to whatever—any conversation that they had with Mr. Peele.

THE COURT: Objection sustained. I allowed the—the statement only but not that the...

GENERAL CROCKETT: All right.

THE COURT: ...Well, I can't—a comment on the evidence, 'cause it...

[1059] GENERAL CROCKETT: Would you—would you read—would you read the statement, then?

MR. STUART HAMPTON: Oh, we object to him reading the statement, if Your Honor please. That'd be proof in chief.

THE COURT: Objection overruled. But, want the ladies and gentlemen of the jury to keep in mind, now, this—this—I'm allowing the reading of this statement not for the purpose of proving the truthfulness of the statement but for rebuttal to the testimony...

MR. STUART HAMPTON: But if you're—if you do that, Your Honor please...

THE COURT: ...purposes only.

MR. STUART HAMPTON: ...we have no way to cross-examine Mr. Peele.

MR. BILL HAMPTON: Your Honor, can I approach the Bench?

THE COURT: Certainly.

(Whereupon a Bench conference was had in the presence of the Jury but out of the hearing of the Jury, and the following proceedings were had, to-wit:)

MR. BILL HAMPTON: You—you know, you've let this in, and I understand what Mr. Crockett's attempting to do, and certainly from my point of view at least **[1060]** instead of reading the entire statement in front of the Jury if Mr. Crockett would point out the differences or let the sheriff point out the differences...

THE COURT: You just want him to point out the differences?

MR. BILL HAMPTON: ...rather than read—I think if you read the entire statement that you...

THE COURT: All right. Either way you want to do it, I'm not going to tell you how to run your...

GENERAL CROCKETT: Well, that's what I was attempting to do here when counsel objected..

(Said Bench conference having been completed, the following

proceedings were had in the presence and hearing of the Jury, to-wit:)

MR. BILL HAMPTON: Well, I still object to it, but the Court's overruled it.

THE COURT: Objection overruled.

GENERAL CROCKETT: All right. Sheriff, making reference to that statement, do you find any reference in there that the front lights were on in the house, the front bedroom light or the front—the lights were on inside Ben Tester's house?

[1061] A. I have to read it.

Q. All right, sir.

THE COURT: Well, read it—read it to yourself, don't read it aloud.

A. Okay.

GENERAL BROWN: Can we approach the Bench again on this matter, Your Honor?

THE COURT: All right.

GENERAL BROWN: Mr. Hampton?

(Whereupon a Bench conference was held in the presence of the Jury but out of the hearing of the Jury and the following proceedings were had, to-wit:)

GENERAL BROWN: This has now been marked as an exhibit. We can hand it to the Jury and let them read it, so it would be admissible for him to read it to the Jury.

THE COURT: Well, I thought you'd agreed up here just a minute ago, Mr. Brown, when you were not here just to go into the—let him point out the—the parts only...

GENERAL CROCKETT: What—what I was going to do is let him read the relevant parts. I'm sorry that the...

[1062] THE COURT: Well, whatever you want to do here on this.

MR. BILL HAMPTON: Well, we—we object to this, Your Honor. We think the State is offering it as—as proof of the veracity and—and the truthfulness of Clifford Peele's statement.

THE COURT: All right, I've (inaudible) to the Jury.

MR. BILL HAMPTON: And—well, we object to it as proof and chief, as hearsay. We cannot cross-examine Mr. Peele, and we think it's objectionable and it's prejudicial.

THE COURT: Objection overruled.

(Said Bench conference being completed, the following proceedings were had in the presence and hearing of the Jury, towit:)

GENERAL CROCKETT: I think, Your Honor, it'd be more coherent if we'd simply ask the sheriff to read all—read—read the statement.

MR. STUART HAMPTON: Your Honor please, for the purpose of the record do you realize that we want to make a continuing objection...

THE COURT: All right.

MR. STUART HAMPTON: ...to anything in connection **[1063]** with this.

THE COURT: All right. The objection is overruled.

A. This is the statement of Clifford Douglas Peele, Route 2, Hampton, Tennessee. Date of birth: 9-23-61. Social Security Number 410-25-4630. He's 5'7" tall; 160 pounds; blonde; brown hair, blue eyes. Interview conducted at the Carter County Sheriff's Office, Elizabethton, Tennessee. Persons present: TBI Agent Don Collins; TBI Agent Preston Huckaby; Sheriff Papantoniou; and Glenida Peele. "On Wednesday, August the 26th, 1981, some time around 11:00 A.M. my wife, Glenida

Peele, and I went to the residence of Joe Street. Joe Street asked me where we could make some money. I told Joe Street the best way we could make money was to find out who went to church on Wednesday night. (Indiscernible) when they come out—when they come and go. Joe Street told me he knew of a house down the road from his house. He also mentioned the residence of Rainbolt. Joe told me that a gun and a colored T.V. would be in a house just below his. Street told me that the guy's cousin lived next door to him. I had asked Joe if it would be cool to get the house (sic). That's when Joe told me his cousin lived next door. I asked Joe what his cousin got to do with us going in the house. Joe said the relative could see us and call the law. Joe Street said the man that **[1064]** lived there lived alone. Farther (sic) that he was about as old as Glenida's Grandfather Stout and would not be too much trouble. I told Joe Street that it made me feel better since he was an old man and that we wouldn't have too—too much trouble. We were coming off Tinker Hill from Joe Street's. Street told me after we had passed the house that we had just passed it. I stopped and started to back up. Joe Street told me not to, that it would be—it wouldn't be cool—it wouldn't be too cool right now, that the relative was at home. Joe Street had told me not to discuss the house in front of Glenida because she would tell about it. I told Joe—Joe Street not to worry about it. I was driving a black gray 1979 El Camino, Indiana license plates. We left from Street's, had the aformentioned conversation, and drove to Dave White's at Rittertown Road in Hampton, Tennessee, and burglarized it. Drove from Dave White's to antique shop at Kyle Campbell's, sold a drill and Skil saw with extension cord. Stole an extension cord from Kyle Campbell's. My guess is the time was around 12:30 P.M. At 1:00 P.M. 8-26-81 we drove to Carden's Beer Package Store in Hampton. Glenida got out of the car with the extension cord and went in Carden's. While Glenida was in Carden's Joe Street told me he knew of others that would help. He mentioned Eugene Montgomery, Gary Street, Jeff Causby. Joe Street and I **[1065]** discussed a plan to

break in the old man's house. I was to tie the old man up and Joe Street was to gag the old man at the same time. Joe said he had to go back home. I told him since I was going to let him out that he could go ahead and buy the rope. Joe didn't have any money on hand, so he got $3.00 out of a glove compartment to buy the rope. Glenida comes out, gets in the car. We got to the tire recapping place in Hampton where Joe Street sold the extension cord for $3.50. Leave the recapping place and go back to Joe Street's house and let him off. Joe and I had discussed him going home to call Eugene Montgomery and Jeff Causby. We told Glenida he was going home to eat a sandwich. Gary Street got with Glenida and I at this time at the Street's residence. Leaving Street's house, driving to Carden's to get ice because the beer was hot. This was around 1:15 P.M., 8-26-81. Joe Street, Glenida and I had smoked no more than four marijuana joints prior to taking him home. Glenida and Gary Street and I then went to Nave's Trailer Park and picked up Tiny Bailey, about 15 years old, went to the first Switch Back at the second curve, sat there, put the beer on ice, smoked pot, drank beer for about 15 minutes. A dude on a motorcycle stopped, tried to sell us a chain saw. While we were there I mentioned to Gary that we might be making some money tonight, that Joe would be talking to him about it. Drank all **[1066]** the beer and left the mountain about 2:00 P.M. Drove to the front of Brown's Castle. Gary and Tiny got out at Toby Williams' house. Picked Joe Street up at Brown's Castle, which was prearranged. We discussed the break-in of the house on the lake, drove to the house which I now know belongs to Wallace Isham, broke into the house, stealing some guns, watches, rings, and money. Went to the left—went to the left, pulled off next to Little Stoney where Joe and I shot the guns we had taken from Isham. Joe told me that he had brought the—he had bought the rope and had it hid at the car wash in Hampton. Joe Street told me we could sell the guns at Donald Grant's. Drove to Donald Grant's where the guns were sold for I think $150.00. Left Donald Grant's at—at Roan Mountain. Drove to Valley

Forge Pool Hall. Jeff Causby was sitting in a car with some other guy smoking a joint. Joe Street asked Causby to get him some pot. Joe gave Causby $35.00. Causby left and came back about 45 minutes with the pot. I asked Glenida to clean the car windows. Joe Street and I sat on the back tailgate of the El Camino talking. Joe Street told me he called Eugene Montgomery and Jeff Causby. That he had explained the break-in of the old man's house with them and they knew what was going on. Joe Street told me at the time that the old man's name was Ben Tester. Joe Street told me the plan was for **[1067]** Eugene Montgomery to cut the screen from the window to the house. Joe was to gag the man. I was to cut the telephone wires. However, when Joe Street talked to Jeff Causby prior to Joe and I meeting at Valley Forge Pool Hall Jeff Causby was not—was to grab the old man, Joe was to gag him, I was to cut the phone wires. Jeff Causby backed out, so the plans had to be changed. The rope was to be used to tie the man up with. Joe Street told me that there would be money and checks in the house. Joe did not mention how much money would be there at Ben Tester's. Jeff Causby came back with the pot and gave it to Joe. Jeff Causby split the pot between Joe and I. First there was conversation that Joe Street was going to Johnson City with Glenida and I to ride the go-karts. To ride go-karts. The idea being to leave Glenida there at the go-kart track so she wouldn't be involved or have knowledge that we were going to break in Ben Tester's house. Joe Street decided not to go. Joe and I decided to meet at the Big K in Elizabethton at 8:30 P.M. Joe Street, Glenida and I went to the pawn shop in Elizabethton near the Capri Theater. The man would not buy the rings but told us A. A. Phillips would buy them. He gave us directions to his house on 'E' Street. Went to A. A. Phillips' house, sold two rings, signed my name as Ronnie Jefferson, got paid $48.00. Left A. A. Phillips' house, went to Long John **[1068]** Silver's in Elizabethton, Tennessee, and ate supper. This was some time after 5:30 P.M. or close to 6:00 P.M. Joe Street changed his mind at this time about going to ride go-karts. He wanted to go

back to Valley Forge to meet Jeff Causby. I told to—I drove to Valley Forge Pool Hall after smoking some pot on a mountain where the city Christmas tree is every year. Joe Street got out and walked to Jeff Causby's house. This was about 7:00 P.M., 8-26-81. Glenida and I drove to Johnson City, Jonesboro Highway, to the go-kart track. The track was closed. Drove to Kiwanis Park in Johnson City to shoot basketball. I was hunting a place to leave Glenida while we broke into Ben Tester's. I met Benny Dale...

MR. BILL HAMPTON: Go ahead.

A. I met Benny Dale Miller. I thought that was his name, howevr I know now his true name is Tommy Dale Taylor. I left Glenida at the park with Taylor's kids. We, Taylor and I, left the park—left the park and went to Sammy's Apex where I bought five hits of acid microdot. Went back to the park, told Glenida that Tommy Dale Taylor and I were going to leave. For her to stay with the kids until I come back. Drove straight from Kiwanis Park, drove to A. A. Phillips' house. Tommy Dale went—Tommy Dale Taylor went in and sold Phillips a ring and a silver dollar. Got paid $42.50. We split it 21-25 each. **[1069]** Drove from A. A. Phillips house to the Big K in Elizabethton at 20 minutes 'til 8:00 or 7:40 P.M. I was not supposed to meet Jeff Causby, Eugene Montgomery, and Joe Street until 8:30 P.M. Tommy Dale Taylor and I went to Hampton. I drove up Tinker Hill like you go to Street's house. I looked Ben Tester's house over. As I passed—turned around in the first driveway past Tester's and went back down Tinker Hill, looking the house over again. My intentions were to go to Ben Tester's door and knock at the door but changed my mind. Looked the house over on a—on a drive-by. I knew that Ben Tester wouldn't be home until around 9:00 P.M., since he was a good churchgoer. Left—left Hampton and went back to the Big K. Got there shortly after 8:30 P.M. Jeff Causby, Joe Street, and Eugene Montgomery was at the Big K. Jeff Causby was driving a truck. Eugene Montgomery was in the middle. Joe Street was

on the passenger's side. I got out and started talking to them. Joe or Eugene asked me what I was going to do with the El Camino. I told him that I was going to leave it with Tommy Dale Taylor. The truck that Jeff Causby was driving was a 1971-72 white Chevrolet pickup truck. I told Tommy Dale Taylor to follow us out to the car—the car wash at Hampton in my El Camino. I got in the truck with Joe, Jeff, and Eugene, drove to Hampton. Jeff Causby drove us straight to Ben Tester's house. Just before **[1070]** getting to Ben Tester's driveway Jeff Causby cut the headlights off, pulled just past the driveway. Jeff Causby backed the truck up Ben Tester's driveway until he got near to the front porch. We all four got out of the truck. Joe Street went to the corner of the front porch nearest Ben Tester's driveway. This occurred just before 9:00 P.M., 8-26-81. Joe Street stood there a couple of minutes. Jeff Causby, Eugene Montgomery and I went to the window, tried to get to the window screen—tried to get the window screen off. It would come—it wouldn't come off. Eugene Montgomery wanted to kick the screen window and all in. I took a black handled triple X knife and cut half the screen out. Eugene Montgomery ripped the rest out. I then went to where Joe Street was standing. I got with Joe Street, and then we started back towards the window where the screen was cut. Eugene Montgomery opened the front door. Joe—Joe Street and I went in the house. Jeff Causby and Joe Street went straight to the den where the T.V. was situated. Joe Street told us the checks were under a lamp on a table in that room. Eugene and I went to the middle bedroom just off from the bathroom. Joe Street said that a gun, pistol, was supposed to be hid under the mattress in that room. We looked for the gun in that room under the mattress in **[1071]** a sewing machine, dresser, and closet. We looked everywhere, everywhere for the gun in that room. We did not take anything out of the room. We stayed in the room about five minutes going through everything in there. Before we left the room Jeff Causby and Joe Street come in the room. Eugene and I went to the livingroom, and Joe Street and

Jeff Causby looked for the money. All four of us then went straight to the kitchen. All four of us went through everything in the kitchen. I went through a silverware set. Joe Street was going through some drawers of the—at the end of the bar. I went over and help him throw stuff out in the floor. I then went through the—through the china cabinet in the dining room. The rest of the kitchen was gone through by Joe Street, Jeff Causby, and Eugene Montgomery. At one point I was left in the kitchen by myself. Jeff Causby, Joe Street, and Eugene Montgomery went to the den. They were—there were—they were there—there were—they were..."

GENERAL BROWN: You skipped a line. I'm sorry to interrupt.

A. "To help do my part." Did I skip a line, you said?

GENERAL BROWN: Yes. Go back where Joe Street and Eugene Montgomery went to the den.

A. "...went to the den and livingroom. Eugene Montgomery **[1072]** was trying to tell me to get in there where they were to help do my part. Eugene Montgomery hollered that someone was coming. I went to the livingroom and got behind the front door. Joe Street got on the other side of the door. Ben Tester came in the front door. Joe Street grabbed Ben Tester from the front and I grabbed him from the rear. Ben Tester fell towards me and on me. Joe Street ran out the front door. I got up and ran out behind Joe. I didn't see where Joe went. I went down from the front of the house to where I could watch the house. Eugene Montgomery came out of the house through the front door and went down to the truck. I went to the truck. Eugene Montgomery told me the man, Ben Tester, was hurt. Eugene Montgomery asked me if I was going to handle my—my ground, do my part. I said, 'Yes'. We got the rope out of the truck and started back to the house when Joe Street came up. Joe Street, Eugene Montgomery and I went back into the house—in the house. Ben Tester was lying in the livingroom floor near the front door. Ben Tester was not moving any. I don't know

whether he was dead or alive. Eugene Montgomery and I lifted Ben Tester up. Joe Street had a piece of cloth, white, that he gagged Ben Tester with. When Joe Street gagged Ben Tester he tied the knot behind his head. Ben Tester's mouth was shut. His tongue was not sticking out. Jeff Causby came out from some **[1073]** part of the house. Joe Street and I got Ben Tester by the shoulders. Jeff Causby and Eugene Montgomery got him by his feet. We four picked Ben Tester up and carried him out the front door. Eugene Montgomery had told me that—that the tying up part was over, that they were going to hang him. Ben Tester—they were going to hang him, Ben Tester. Eugene had moved the truck over to the apple tree, backed up to the apple tree. We carried Ben Tester over to the pickup truck. Tailgate was already down. We laid Ben Tester down on the tailgate. Joe Street and I got up in the truck bed. Eugene Montgomery and Jeff Causby climbed up in the tree. Eugene handled the rope, tied the rope around the tree limb and three times—about three times and tied it off with a knot. The rope was hanging down with loops tied in it. Joe Street and I put the loops around Ben Tester's head and down around his neck. Joe Street and I lifted Ben Tester off the tailgate. The rope loop tightened and—around his neck. Ben Tester's feet was off the ground hanging from the tree limb by the rope. Jeff Causby, Eugene Montgomery got out of the tree. Everybody went to the truck except Jeff Causby. I don't know where he went. Eugene Montgomery got under the wheel. Joe Street got in the middle. I got on the passenger's side. We left the residence of Ben Tester. Eugene Montgomery turned the **[1074]** —turned the headlights on when we got to the road at the entrance of Tester's driveway. We stayed at Ben Tester's approximately 25 to 30 minutes. The exact time we left there I don't—I do not know. I got out of the truck at the car wash in Hampton, got in my El Camino. Tommy Dale Taylor and I drove to Johnson City. Tommy Dale Taylor did not have any knowledge what we had done. Went to Kiwanis Park, let Tommy Dale Taylor out, picked up Glenida, drove to Watauga Lake and spent the night. Got up the next

morning, Thursday, 8-27-81, straight to Gary Street's house. Joe Street was not at home. Gary Street told us that Joe Street with Jeff Causby (sic) the night before, 8-26-81, that Joe was high on acid and beer. Gary Street, Glenida and I went to Glenida's mother's, Mrs. Lundsfords. We got there. She told us that the law was looking for us, that they, White, had taken a warrant out. Let Gary Street out at Tommy—at Toby Williams' house. Glenida and I went to Johnson City, met Ronnie Miller. Ran around awhile in Johnson City until we all were arrested and put in the Washington County Jail about 7:30 P.M., 8-2/-81. I, Cliff Peele, Jr., solemnly swear that this statement is the truth, whole truth, and nothing but the truth, so help me God. I have read or had read to me this sworn statement which begins on Page 1 and ends on Page 13. I fully understand the contents **[1075]** of the entire statement made by me. I have made this statement freely without hope of benefit or reward, without fear of punishment and without coercion, unlawful influence, or unlawful inducement. I am not under the influence of alcohol or drugs—and drugs. Signed, Clifford Peele, September 16th, 1981. Time: 10:55 P.M. Witnessed: S.A. Donald R. Collins, TBI; witnessed: George Papantoniou; witnessed: Preston Huckaby."

GENERAL CROCKETT: Sheriff, is there anything in that statement, now, having read the full four typewritten pages, that mention the light being on in the house of Ben Tester?

A. No, sir, it has not.

Q. Is there anything in that statement as you read it that indicates that the shirt of Ben Tester was ripped or torn?

A. No, sir, it was not.

Q. Is there anything in that statement that indicates that the rope used to hang Ben Tester was a white nylon rope?

A. No, sir, it has not.

Q. Is there anything in that statement that indicates that a sheet was torn to make the gag?

A. No, sir.

Q. Is there anything in the statement of Clifford Peele that the wallet was in the right front bedroom floor?

[1076] A. No, sir.

Q. Is there any statement in the testimony of—or the statement that was taken and which you had at—on the 16th and the 17th when you questioned the defendant, is there anything that indicates in that statement that money had been taken from the wallet of Ben Tester?

A. No, sir, it has not.

Q. Was there anything in that statement of Clifford Peele's at that time that indicated that shirts had been taken from the Ben Tester residence?

A. No, sir, it has not.

* * *

[1077] *** GENERAL CROCKETT: Did the defendant on the—in his statement to you of 27 June 1982 view this truck?

A. Yes, sir.

Q. All right, sir. That was the statement made 30 days ago?

A. Yes, sir.

Q. Did he make statements to you at that time concerning this truck?

A. He showed me the position where he was standing at the tailgate at the time that he put the second loop in the directional —as per his statement from Kelly Banner. He told me that this is the same truck that he used the night to hang Ben Tester. It's the same tailgate that they put Ben Tester on.

Q. Did he demonstrate to you how he placed—how he was in that truck or on—near that truck and placed the loop over Ben Tester's head?

[1078] A. Yes, sir, he—he positioned himself at the tailgate and told us exactly where he was at and where Clifford stood. And Clifford put the first loop on and he would—he put the second loop on.

* * *

[1079] * Cross-Examination**

By Mr. Bill Hampton:

Q. Sheriff, let me recall your attention briefly to September the 17th. Now, on that date what time did you first see Mr. Street down in the Carter County Jail?

A. Probably around 7:00 P.M.

Q. All right, sir. And, I believe that you had some conversation downstairs with him before he was brought up and you say talked to Agent Collins and Mr. Huckaby and yourself?

A. True, I had discussed certain—he wanted—he wanted to tell—he wanted to give us a statement, so Judge Ray was there. And we called his dad. And his father came in. He didn't want his mother. We called Assistant Attorney General Lynn Brown.

[1080] GENERAL CROCKETT: Excuse me, Sheriff, did you say he did or did not want his mother?

A. He did not want his mother.

GENERAL CROCKETT: Okay.

A. And, upon a preliminary discussion of—he wanted to confess and told me that he can tell me just anything I needed to know on that night. I, then in turn, called Agent Collins and he came in with his supervisor, Huckaby. And I turned over the investigation—I turned over the—the writing of the statement to Agent Collins.

Q. And of course, you had him downstairs in the bottom office, which is the Highway Patrol office in the old jail before he was brought upstairs, Sheriff?

A. It's not the Highway Patrol office. It used to be the Highway Patrol Office. And, yes, he was there.

Q. And you and he were talking before he went upstairs?

A. With the Attorney General and with his father and with the Juvenile Judge Ray.

Q. And you and he had some conversation without the juvenile judge and Judge Ray (sic)?

A. No, he did not. The only conversation he had with me prior to the judge was that he wanted to make a confession.

Q. And, anyway, when you brought him up there what was **[1081]** his mental state?

A. He was in good shape at that time.

Q. Well, did he ever start crying?

A. Yes, sir, he cried for some ten minutes. That's when I came in and I listened to his conversation, and I asked Joe, I says, "Joe, Mr. Tester's been nice to you. You tell me downstairs in front of the judge and everybody else you want to tell the truth." I said, "Don't take our time for nothing. We have other things to do." I says, "You know the man has been hung." And by that time he became emotional, he started crying. And, in fact, he was the only person that I've charged that showed any emotion.

Q. In fact, Sheriff, when you brought him upstairs he was saying something different than what he told you downstairs, and you had to admonish him and telling to, "Quit wasting our time and tell us the truth, because you're not telling me everything what you told me downstairs, you're telling me something different now."

A. That's right.

Q. All right, sir. And, of course, he stated he wanted to go home a number of times.

A. No, he just asked him to hurry up so he could go home.

Q. All right. Approximately what time did this alleged **[1082]** confession start, sir?

A. I—I don't know exactly. Would have been around 8:30, 9:00.

Q. All right. And who all was present did you state at that time, sir?

A. Before the confession started...

Q. Yes, sir.

A. ...in—writing it was Don Collins, Preston Huckaby, Juvenile Judge Ray, myself part of the time, Lynn Brown, and Mr. Bill Street.

Q. All right, now, before this alleged confession started you made him a promise, Sheriff, that you would leave him on the same bond and that he would go home that night, did you not, sir?

A. We agreed collectively with the judge and the Attorney General that we was not going to charge him that night, yes, sir.

Q. All right. But before he made his statement is what I'm asking you, Sheriff, you made a statement to him saying, "Joe, if you'll tell us the truth you can to home."

A. No.

Q. "And we'll leave you on the same bond."

A. No.

Q. You're sure about that...

[1083] A. I'm positive about that.

Q. ...as everything else you've said at this hearing here today?

A. I'm positive of what I said here today and I'm positive of what I'm telling you right now. The man asked us if he could go

home on the same bond for telling the truth. I said, "I'll ask the Judge and it will be more than likely reasonable that we're going to do this," because I did not want to arrest him and let the news media pick it up and lose the other three or four that I was seeking to get in.

Q. Sheriff, you recall your testimony on the 6th of November of 1981 at the transfer hearing, at which time you were sworn regarding this statement?

A. I don't recall it, but read it.

Q. I'm going to, Sheriff.

GENERAL BROWN: We would ask for the page.

MR. BILL HAMPTON: On page 46 of the transfer hearing on November the 6th, 1981. Question: "Now, Sheriff, on the night you took this confession did you promise to let this man out of jail and go home if he would confess?" Answer: "No, I told him if he cooperated and tell the truth that I would request the Judge to leave him on the same bond." Question: "To leave him on the same bond?" Answer: "He asked me, 'If I **[1084]** confess will I have to go to jail?' I said, 'If you confess to the truth, the whole truth, I'll request the Judge to leave you on the same bond until we arrest everybody."

A. That's in essence what I said here today.

GENERAL BROWN: We...

MR. BILL HAMPTON: All right, sir. So, apparently, then, after this man giving you this alleged ten page confession you let him go home?

A. Right. I didn't let him go home, the Judge let him go home.

Q. Well, you were a party to this agreement, were you not, between the...

A. Right, I suggested it, yes. For his truthful testimony that

he could stay on the same bond instead of charging him that night and ask for an additional bond.

Q. And, prior to this purported confession on behalf of this young man you informed him, of course, that you had a confession from Clifford Peele.

A. Yes, I did.

Q. In fact, he knew it was in there because you had it right in there in the sheriff's office with you.

A. I had a statement in the sheriff's office. He had a copy—he had the original copy and we was trying to make a **[1085]** copy for the Attorney General at that time.

Q. In fact...

A. He did not read or anybody else read to him the confession. The only thing he had seen is the signature of Clifford Peele, that he did give us a confession.

Q. But you and Mr. Brown were upstairs in your office on that night when this alleged confession took place, and you had Peele's statement in front of you, now didn't you, Sheriff?

A. No, we did not.

Q. You did not—you never had it in front of you?

A. We had it at the time that I gave it to him, but we did not—I did—I did not have a statement and read to him or let him read it or ask him to answer it.

Q. And, from time to time, when Mr. Street was not saying what you wanted him to say, you interrupted Agent Collins, said, "Now, that's not so. This is how it really happened," didn't you, Sheriff?

A. No, when we knew certain facts that it was not there, when we knew—when I knew that he told me certain things prior to it downstairs, and then he was deviating from it, that's the only time I asked him. That was only one time that I asked him to

tell the truth as he had promised and not take our time. And that's when he became emotional.

[1086] Q. All right, sir. Now, of course, after the day—after this purported confession Mr. Street called you up on the phone, this defendant, and stated that he wished to recant this statement, that it was not true. That he wanted to come down and bring a preacher down there and tell you that this was a lie.

A. That was true what you're saying with the exception to it, sir, that he told me that's what his lawyer coached him to say. After discussing it with his lawyer he wanted to take the statement back. And I said, "Well, if your lawyer told you to give you this—to give this different statement tell him to come down and write it. Tell him to come down and confess, that's what I told him."

Q. But you never did have a subsequent conversation with him?

A. Yes, sir, I had a—I had a conversation with him. He called a preacher and the preacher didn't want to show up. And Lynn Brown was the only one. He told me that his lawyer had coached him and that his cousin, Eugene, threatened him and so did Kelly Banner, his mother, and his grandmother. And Eugene's mother, which is his aunt. He said he'd better change that statement, and that was the direction of Stewart Hampton.

Q. But regardless of that fact he did, in fact, call **[1087]** you and want to change his statement?

A. He came down. He didn't only call me, he called me—he called me and told me that he wanted to come down and he want to talk to me (sic) and he wanted Lynn Brown down there and he was going to bring the preacher, too. So he called him and I went—I sent another cruiser up there, picked up Joe, and brought him down.

Q. All right, so...

A. He was a nervous wreck.

Q. ...so according to your testimony, Sheriff, you had problems with him right before the alleged confession not telling you what you wanted to hear, and then the day after he was telling you that he had not told you the truth.

A. I had no problems. He's the only one that had any problems.

Q. Well, he changed his story from the time you had him downstairs on the night of the 26th to the time you brought him upstairs, because you had to admonish him, didn't you?

A. I had to ask him to tell...

Q. You said, "Joe, you're wasting everybody's time."

A. ...I had to ask him to tell the truth.

Q. All right, now, his father was up there, is that right?

[1088] A. All the time.

Q. He stayed up there every minute.

A. Every minute of it.

Q. And you're as sure about that as everything else you've testified to?

A. While the—I'm positive. Every minute that—that Joe was giving us a statement Mr. Ban—Mr. Bill Street was there. We had two or three breaks. When he wanted a break we went and got him some Coke or something. That's the only time. But whenever anything was written down Mr. Street was there present.

Q. And you got him some coffee, Sheriff, because you knew he was drunk and he'd been drinking, now, didn't you?

A. No, sir, I did not.

Q. Where was his mother?

A. I drink coffee every time. And Bill was not drunk that night. You—you would like him to be, but he was not.

Q. Where was his mother? You would like him to be...

A. His mother was downstairs with his grandmother. And Joe repeatedly did not want them upstairs and his father said, "Look, if you're going to tell this in front of me I want you to tell it in front of your mother." And he says, "No, I can't tell it in front of my mother." He didn't want her up there. **[1089]** And his father asked several times to have his mother there with them. In fact, at the end of the statement he also told him, says, "Please, now, tell your mother exactly the same thing you told me. And, you know it's going to create problems to me." He says, "You know we're having problems with the wife," and he ended up consequently going through a divorce situation and then they got back together just recently.

Q. In fact, Sheriff, it's just the opposite. You didn't want Mrs. Street up there because you knew every time you tried to talk to the boys that the mothers wouldn't—told them not to say anything to you, now, didn't you?

A. I have no choice as to who's going to be there, if I like them or not. If the man—if the juvenile requests both parents and if...

Q. Mrs. Street was down there that night, wasn't she?

A. She most certainly was. She came in...

Q. She was down at the bottom...

A. ...an hour and a half later.

GENERAL BROWN: Your Honor, he's not letting the sheriff finish.

THE COURT: Let—let him answer. Let him answer.

MR. BILL HAMPTON: Go ahead, Sheriff.

A. She came in within—shortly after the confession **[1090]** had started.

Q. She came in shortly after the confession had started?

A. Yes, sir.

Q. And did she stay?

A. And she stayed 'til it was finished.

Q. His mother?

A. Right.

Q. Was in the room?

A. Right.

Q. The whole time?

A. Not in the room where the confession was going, she was downstairs.

Q. Downstairs?

A. Yes, waiting for him to finish the statement.

Q. Did she...

A. And he rode back home with his father because he did not want to ride home with his momma.

Q. Did she ever ask you individually, Sheriff, if she could come up and talk to her son?

A. No, sir, she did not.

Q. Did she—did you ever hear her ask Mr. Brown or Mr.—any of the other TBI agents?

A. I don't know if she did or not. She didn't ask me. **[1091]** And, the only thing that anybody ask me was just her husband, and Joe did not agree to it. He didn't want his mother there.

Q. So after this young man has given you a ten-page confession to probably in your estimation the worst murder in Carter County you let him go home and stay home for five days until you arrested him?

A. I don't tell you how to prosecute or defend a case, and I don't think you can tell me how to investigate one. This was the

choice between our investigation and the Attorney General and the Judge's conclusion, and, true, it was the worst murder I have ever experienced or I think anybody else in Carter County. That's why I had to be so tedious with the situation. I spent 30 days, day and night, trying to seek this information. And I was very courteous to every one of them.

Q. And you said, "Joe, if you'll just tell us you did it you can go home. I don't care whether it's the truth or not, we'll let you go home."

A. No, I did not say that...

Q. And that was the important thing...

A. ...Mr. Bill.

Q. Now, how many times did you talk to him, Sheriff, from the date of the alleged—of the homicide until this alleged confession that you're relying on and the State's relying **[1092]** on in this case?

A. You talking about the first confession, the last confession, the ones in between?

Q. The one on the 17th that we're talking about right now, between the 26th day of August and the 17th day of September?

A. I had talked to Joe three times.

Q. Three times. Well, now, you recall your testimony on November the 6th of 1981, on Page 41. Then Mr. Hampton asked you: "Then over the next 21 days you talked to Joe 7 times?" Answer: "Yes. Mind you, now, he was in jail and he constantly he was calling up then, he wanted to talk to me about something." "Now, when you talked to him on these times was there anyone else present?" "Always." So you said you talked to him seven times back on the 26th.

A. Well, maybe that's true what the—the record reflects there, but I know I talked to him three times during confessions. I don't know about how many other times he wanted to call his

mom or he wanted to go to the doctor or something else. So, if you're talking about confessions, I talked to him about three times. If you're talking about—I don't know how many times I've talked to Joe. It's been—every time you turned around he wanted something else to talk to you about. Either his head was hurting or he wanted to call mom or cry **[1093]** sometimes to get Eugene to come in and confess with him. So, I've talked—I've talked to all of them whenever I have the time. Whenever they request to see me I make it possible for them to see me. I don't know what they usually want. It might be something about the confession, it might have been something about a personal situation.

Q. In fact, you were so anxious to—to talk to this young man that when his father had a wreck in a —in a vehicle coming down to your office that you even went to the hospital when his father was on his—in the bed in the hospital and tried to take a conversation from him at that time, you and Mr. Crockett, didn't you?

A. You're most certainly right that I wanted to get the truthfulness about the situation, because Hampton was in a panic. And people was buying shotguns and shells all over the place, and I didn't want to see another innocent person get killed because of what these people did.

Q. You didn't care when or how you talked to this man, or what you advised him of. You were just...

A. I—I'd talk to him at 5:00 in the morning if he wanted to talk to me at 5:00 in the morning or 1:00 in the morning or whenever. I'd have talked to anybody about this case any given time, 24 hours a day. And I'd have stayed up 60 hours if **[1094]** — if he needed me.

Q. All right, now, let's back up just a minute. During this alleged confession that Mr. Street purportedly gave you and you all wrote down that night. Numerous times you interrupted Agent Collins and said, "Now, Joe, that's not true, this is the way it happened," didn't you, Sheriff?

A. No.

Q. You never did that?

A. I interrupted once or twice. I was most of the time outside. I came back to the conclusion of the statement. And, I think Lynn came out a couple of times, but Judge Ray, his father, Preston Huckaby, Don Collins and Joe Street was there at all times of the confession. I think Judge Ray came out once or—or twice, but he went right back in, waited for the confession, and he—in front of the Judge the confession was read back to Joe Street. In front of his father.

Q. Yeah, but Agent Collins had to call you down and stop you, by his testimony here today. He had to interrupt you and say, "Now, Sheriff, just stop. Quit reading Peele's statement and quit interrupting me."

A. No, he did not.

Q. He never did that?

A. No.

[1095] Q. So his testimony is obviously perjury.

A. Me and...

GENERAL BROWN: Your Honor, I object. This man did not testify that that statement was read at all to the defendant.

THE COURT: We'll—we'll leave it up to the Jury to determine what's been testified to.

A. Me and Collins from time to time, we get heated at each other in the interest of solving this murder case. Some of his techniques may not agree with mine and vice-versa, but we never got into a situation as you're trying to claim it to be. We—we would always have discussions about a case. I cannot agree with me all the times (sic) and I won't agree with him. But that doesn't mean that we argue or he's—he's going to be in that position to stop me when—I'm not—I'm not that unpolished in taking a statement, Bill.

MR. BILL HAMPTON: Now, Sheriff, when this Juveniie Interview/Interrogation Waiver was signed on 9-17 1981 at 9:20 P.M., when this alleged confession started it was filled out by—I see here by Agent Collins, and it has, "Attorney: Stewart Hampton." Has, "Charge: Homicide of Ben Tester." Now, you knew as well as Agent Collins and as well as Lynn Brown that he had an attorney and it was Stewart Hampton on that day, didn't you?

[1096] A. He did not because the court appointed Stewart Hampton to represent him. He asked him who was the attorney that ever represented him or if he has an attorney. He said, "I have an attorney at this point for the burglary. I don't have an attorney for the murder case."

Q. Well...

A. "And I don't want one."

Q. All right, Sheriff, you see this Juvenile Interview/Interrogation Waiver, do you not?

A. I most cert.ly do.

Q. And it says down here on this line, "Attorney: Stewart Hampton."

A. That's the—that's the only attorney he ever done business with, and he put him down as a—as a reference.

Q. Does it say "Stewart Hampton" under "Attorney"?

A. It sure does.

* * *

[1097] *** MR. BILL HAMPTON: Exhibit 38, I apologize. The only question I'm asking you, Sheriff, and I'm going to give you plenty of time to answer it, it says, "Attorney", and what does it—by the name what does it say?

A. "Stewart Hampton".

Q. And, under "Offense" what does it say? Right there on that line.

A. "Homicide, Ben W. Tester."

[1098] Q. Thank you, sir.

A. May I explain?

Q. Yes, sir, go right ahead.

A. Okay. He said that this is the attorney that he was — that was representing him in a burglary charge, he does not have an attorney now, he didn't want one, he wanted to make a statement without his attorney present. And, consequently the Court appointed Stewart Hampton to represent him in this case. So, obviously he was not a hired attorney, and he was not there representing him in that capacity.

Q. Well, Sheriff, you had a—you had a 17-year-old juvenile at that time that you were dealing with.

A. Yes.

Q. High school drop-out.

A. Yes.

Q. Father there, intoxicated at the time.

A. No.

Q. And you didn't call his attorney.

A. Father was there but not intoxicated.

Q. Mother wasn't allowed to come up.

A. He did not want his mother, he did not want his attorney. And his father begged him to bring his mother up. He never asked for an attorney. And the juvenile judge was [1099] there and so was the Attorney General's office representative.

Q. Okay, Sheriff, let's turn just a moment to this alleged statement on June the 27th that you supposedly took down here in the office with Mr. Cobaugh.

A. Okay.

• • •

[1100] *** MR. BILL HAMPTON: Well, Sheriff, there's no question about on the 27th you knew Joe Street had an attorney.

A. That's right.

Q. Because Mr. Hampton had been to all the hearings.

A. Yes, sir, but he's also 18 years old, and he has that choice, under our laws today, to either have his attorney with him or not, and his choice was not to have his attorney again.

Q. And you knew when he turned 18, of course.

A. Most certainly I did.

Q. When was that, Sheriff?

[1101] A. A couple of months ago. I'll be glad to read the record and give you his exact date of birth. I don't recall the exact—the exact date.

Q. And, of course, at that time you allege that he—you advised him of all his rights, the right to have an attorney present, anything he says against him would be used against him in a court of law, and he waived all those rights?

A. Not only to me but Captain Henson and Captain Donnie Shepherd.

Q. And, of course...

A. And there was a Judicial Commissioner in front of him.

Q. And, of course your—you've been investigating crimes now for six years, Sheriff, haven't you, as...

A. At least.

Q. ...as the High Sheriff of Carter County, Tennessee?

A. Yes, sir, I have.

Q. And you employed—employ a large staff of—of deputies and investigators?

A. I don't employ but—I only have two investigators.

Q. All right, sir, and you've taken many statements of individuals in your past six years?

A. Yes, sir, I have.

[1102] Q. And you knew you were in a homicide case?

A. Yes, sir, I did.

Q. In one of—in a large homicide case?

A. Yes, sir.

Q. And yet you didn't even bother to—you say that you advised him of his rights, but you didn't even bother to have a—a waiver signed by him that night.

A. I have a note that he gave me down that he wanted to talk to me about this case. I've been—I have about 50 different waivers that he has signed. He knows the rights better than I do.

Q. But an experienced investigator like you, Sheriff, you'd never take a statement from a man without having him sign a waiver, now, would you?

A. Look, I did not take a written down statement because you people were supposed to have been fired the very next day by him if you didn't want him to give us a statement, and he was coming the very next day to give the statement to the Attorney General, and regardless if you would have told him to or not to, he was going to dismiss you as—as representing him. And he was just hitting some highlights of what statement he was going to give me the next morning.

Q. But you didn't get a signed waiver now, did you?

[1103] A. No, I did not. I told you several times.

Q. Okay, well, I just wanted to hear it one time for you—from you, instead if answering other questions that I haven't asked you.

THE COURT: Gentlemen, let's don't make remarks.

MR. BILL HAMPTON: Now, you took him—you say you took him out there to the car, to the truck that belonged to Mr. Bobbitt.

A. He told me he can show me and identify the truck, also. I'll be glad to show it to you.

Q. In fact—in fact what really happened, Sheriff, you said, "Now, that's the truck, isn't it? That's the truck right there."

A. No. No. I asked him if this is the truck that he was referring to, and he says, "Yes, this is the same truck, only the paint has changed. They have put a red stripe in front of it and they had painted over it with a primer red stripe was there." He said, "It's the same tires, the same tailgate, the antenna was busted. It was still there. It has been changed a couple of times since then."

Q. That's what you said?

A. That's what he said. And I left the room, and he stayed there with Henson and Judicial Commissioner Bob Cobaugh, **[1104]** and I was in my office when they returned. I let them continue on their conversation. I wasn't even in that room that long, except to hear what I just said. And I left him with Henson and Commissioner Cobaugh.

Q. So, after being locked up in jail for approximately ten months, suddenly this man comes down and gives you another statement, is that what you're now telling the Jury to believe?

A. That's what I'm telling you. And that's what he did.

Q. Now, Sheriff, this statement that you've read into the record of Mr. Peele, of course you have since learned that this statement is a lie in that it leaves out Glenida and Tommy Dale Taylor, haven't you?

A. No, sir, I have not learned that it's a lie. I only have learned that he has added on to it, just like Joe Street did. Every one

of them started with a—a piece of a statement that is true, and then they added on more and more in detail afterwards.

Q. Well, this statement that Mr. Peele gave you on the 16th, it does not implicate his wife, Glenida Peele.

A. That's right.

Q. And, of course, he's given a subsequent statement implicating her now, hasn't he?

A. Yes, he has.

[1105] Q. And this statement on the 16th does not implicate Tommy Dale Taylor. Says he was down at the car wash while this thing was going on.

A. That's also correct.

Q. And Mr. Peele's given you another statement now stating that—that, in fact, Tommy Dale Taylor was involved in this homicide and was up there at the time, hasn't he?

A. Yes, he has.

* * *

[1108] *** Q. Sheriff, of course this case has received alot of publicity, has it not?

A. Everybody knows that.

Q. All right, sir.

A. It most certainly has.

Q. Right. And, of course, it's undisputed from every**[1109]**body's testimony here today that the alleged homicide or the homicide of this gentleman took place on the 26th day of August.

A. Yes, sir.

Q. Or somewhere thereabouts.

A. Yes, sir.

Q. And that this purported statement that you have from the defendant, Joe Street, was allegedly given to you on the night of the 17th and the morning of the 18th. The statement you took from Joe was on the 17th and the morning of the 18th.

A. What—what do you want to know about it?

Q. I'm just saying is—that's true, correct?

GENERAL CROCKETT: Of what month?

MR. BILL HAMPTON: Of—of September.

A. The record reflects that.

Q. All right. And between the 26th day of August and the 17th day of September there had been widespread publicity about this case in the Johnson City paper and all the local papers and radio stations.

A. Probably it has.

Q. Yes. And in fact they've come out with articles stating how the man was hung, where he was hung, was hung with a rope, the house was ransacked, all that was out in the paper, wasn't it, Sheriff?

[1110] A. It—it has certain—it more than likely has certain representation, yes.

Q. In fact, you've given statements to the press to that effect. Prior to getting these alleged statements from...

A. Preliminary statements I have given to the press and some of the—some of the people were there.

Q. And it was common knowledge that the screen was torn, that the house was ransacked and the man was hung by a rope.

A. True, but it was not common knowledge...

Q. And that there were things missing from the house.

A. ...about the—it was not common knowledge about the shirts, the torn shirt, where the wallet was at, how much money

was taken out of the wallet and some of the other items that only a person that would have been there would have known.

Q. Well, the motive—it—it was in the paper that there was a motive of robbery was there not, Sheriff?

A. I'm sorry?

Q. The motive apparently was robbery or burglary, was that not true?

A. There was—in my—in my estimation, my opinion I think it was a combination of both. They wanted to rob and kill.

* * *

TESTIMONY OF PRESTON HUCKEBY

[1113] Direct Examination

By General Brown

Q. State your name and occupation to this Court and Jury, please, sir.

A. My name is Preston Huckeby, spelling of the last name H-u-c-k-e-b-y. I'm the Assistant Agent in charge of criminal investigations for the eastern part of Tennessee, which would be about Davidson County, Nashville, east.

Q. And, is this with the Tennessee Bureau of Investigation?

A. Yes, sir.

Q. How many agents do you have under your supervision in this occupation as Assistant Agent in charge for the entire—the entire East Tennessee area?

* * *

[1114] *** GENERAL BROWN: Would you go ahead and answer the question?

A. How many agents?

Q. Yes.

A. There's approximately 26 field agents, however there's some narcotic agents, some agents in special services that are not under my direct supervision, however they are in East Tennessee.

Q. And how long have you been with the TBI?

A. With the TBI and the Highway Patrol I'll start 26 years in December.

Q. You've been in law enforcement for 26 years?

A. Yes, sir.

Q. Did you happen to be in Carter County, Tennessee, on or about the 17th day of September last year, 1981?

A. Yes, sir, I was.

[1115] Q. What—what were you doing up here in—in Carter County?

A. I was instructed to come here by my supervisor out of the Nashville office to assist Agent Collins and Sheriff Papantoniou in the investigation of the Tester case.

Q. And on that particular day of September the 17th were you upstairs in the Carter County Sheriff's Department during the questioning of the defendant in this case, Joe Street?

A. Yes, sir, I was.

Q. For how much of—of that questioning were you present?

A. I was there during the entire statement that Don Collins took.

Q. Was Joe Street's father there during this statement or for what portion of the statement was Joe's father there?

A. He was there during the entire statement.

Q. Was his father intoxicated or drunk at all to your observation?

A. No, sir.

Q. How many people drunk have you observed in 26 years of law enforcement?

A. I have no idea. Hundreds.

Q. Did this defendant, Joe Street, ever ask for his **[1116]** mother to be present during this entire questioning that evening?

A. Not to my memory, no, sir.

Q. Did he ever ask for his attorney to be present?

A. No, sir.

Q. Did the sheriff, George Papantoniou, threaten to send Joe Street to the penitentiary the next morning if he didn't tell the truth?

A. No, sir.

A. No, sir.

Q. Was he threatened in any way, whatsoever, by the sheriff?

A. No, sir.

Q. At any time during that questioning did Don Collins get mad and run out of the room?

A. No, sir, he didn't get mad and run out of the room, he—he quit writing at one time when the sheriff interrupted to bring up something that'd been said, and I'm not—I don't even know what that was, but the only thing Don did, he was writing and when the sheriff went to talking—Don had been writing for some time, longer than I could have probably. And, when the sheriff went to talking he just relaxed and—and put **[1117]** his pencil down on the desk and waited 'til the sheriff got through talking before he started his statement—or, started his interview back.

Q. Did the sheriff any time during this evening or the taking of this statement, since you were there the whole time, did he tell Joe Street what to put in the statement?

A. Did he tell him what to say?

Q. Yes.

A. No, sir.

Q. And, at the end of—of this long process of taking a ten-page written statement was the statement read over to Joe Street in the presence of his father?

A. Yes, sir. In fact, I think I read the statement, if I'm not badly mistaken.

Q. And how—how did you do that?

A. How did I read it?

Q. Yes.

A. Word-for-word from Agent Collins'—what he had written during the interview.

Q. And did—did Joe sign that statement as being true that evening?

A. Yes, sir.

Q. After it had been read to him?

[1118] A. Yes.

* * *

GENERAL BROWN: Did he or did he not circle certain portions of the statement that Agent Collins had written down and—and made a notation in the margin, "This is not true"?

A. Yes, sir, where we would make corrections or where that he would say it was not right, we would mark it and—and he would initial it, or he would mark it himself and initial that he had done that, or that it was not...

Q. So that by...

A. ...a correction had been made, I'll put it that way.

Q. ...so that by the time the statement was signed had Joe Street approved of the entire statement as being true?

A. Yes, sir.

[1119] Q. You may ask him.

Cross-Examination

By Mr. Bill Hampton:

Q. Of course, Agent Huckeby, am I saying your name...

A. Yes, sir. Yes, sir.

Q. ...saying your name right?

A. Yes, sir.

Q. Approximately what time did you arrive at the Carter County Sheriff's Department on the evening of August the 26th of 1981?

A. I had already gone—I—I don't believe I could tell you the exact time. I had already gone to the motel which was the Camara Inn. And I received...

Q. That's the only place you could have stayed in Elizabethton, no where else...

A. I think so, really. But, I received a call that we needed to go back to the jail, and I did go back to the jail and met with Collins and the sheriff and I believe another agent was there at that time.

Q. Where was the defendant when you first saw him on that night?

A. I believe he was upstairs in the room where we did the invest—the interview.

[1120] Q. So, Agent Huckeby, you really have no knowledge whatsoever of what conversations that might have taken place between the defendant in this case, Mr. Joe Street, and Sheriff

Papantoniou prior to your arrival that night and you walked upstairs and saw him in the sheriff's office for the first time?

A. None, whatsoever.

Q. And, of course, after the statement was taken did you leave the room and go back to the Camara Inn or what...

A. Yes, sir, I did.

Q. And you have no knowledge of what statements transpired between the sheriff and Mr. Street after you left?

A. No, sir.

Q. So, your contact with the defendant in this case was strictly during the time this purported or alleged confession took place from approximately 9:20 in the evening of the 26th until 1:30 in the morning on the evening of September the—I'm sorry, the 17th—September the 17th from approximately 9:20 until September the 18th at approximately 1:30 in the morning is the only time you had any contact with the defendant?

A. Right, sir, I've never seen him before nor since, to my knowledge.

Q. All right, now, is it not true, Agent Huckeby, that **[1121]** during the course of this alleged statement that Sheriff Papantoniou from time to time would interrupt Agent Collins, and would tell Joe that this is not true or this is not correct, and this is how it happened, and in fact—did that in fact occur, sir?

A. I don't remember it exactly that way. A couple of times the sheriff did interrupt. But the way I remember, he would say, "That is not what you had told me before."

Q. "That is not what you had told..."

A. "That is not what you had said before," or something to that effect.

Q. Did the sheriff make you aware at any point in time that he had had a conversation with Joe downstairs prior to the taking of this statement on the 17th at 9:20?

A. I don't believe he told me that, but I—I guess I assumed that he had or something, due to us being called back to the jail to take a statement from him.

Q. Do you ever recall some statement to the effect, sir, that—the sheriff admonishing Joe and saying, "Well, you're not telling me the same thing that you told me downstairs, Joe. Now quit wasting everybody's time"?

A. That's what I was referring to a minute ago. When he would interrupt—when he interrupted Don he said, "That's **[1122]** not what you told me."

Q. Okay, now, this—you were aware that you were dealing with a 17-year-old minor at the time?

A. Yes, sir, that was—we had his father there for that reason.

Q. And he was somewhat emotional and crying and upset at that time?

A. Yes, sir, he was at the beginning.

Q. And he wanted to go home and mentioned going home several times, I believe, during the course of this purported statement.

A. I—I can't say that he—he said something about going home, but he wanted to know how much longer it would take, or something, or how much longer are we going to be doing this.

Q. Did you ever in the course of this alleged confession on the 17th and 18th of September see his mother, Mrs. Street?

A. Yes, sir, I think I did. I think—but, when I saw her I think she was—she was either outside the jail or she was downstairs in what I would call the office to the jail. Excuse me. To the jail there.

Q. Was his mother ever in the room when this purported confession was given?

[1123] A. No, sir.

Q. Agent Huckeby, you've been in law enforcement for how many years?

A. Start 26 in December.

Q. And, during the course of your 26 years as a law enforcement officer with the TBI and Highway Patrol...

A. Right, sir.

Q. ...in your vast experience have you ever, in the course of—of your studies and in your employment seen a case where a man allegedly confessed to a homicide, to a hanging death, and he was allowed to go home and remain free for—for five days? Have you ever seen that occur, sir?

A. I don't believe I ever worked a case where a juvenile was involved in a homicide before, to be honest with you.

Q. Well, I think you're getting around my question. Have you ever seen it happen in any type case...

A. I...

Q. ...whether it's a juvenile or not? Where a man gives a purported confession and he goes home for five days. Were you surprised when he went home?

A. Not really, because the juvenile judge and the Attorney General were there, and they were in agreement.

Q. The juvenile judge and the Attorney General were in **[1124]** agreement?

A. It was—it was under my—with the sheriff, they were all there, that he was—after—after he got through making his statement, not that he was going to make his statement to get to go home. After it was through that he—that he would go home.

Q. Did you hear some conversation between either the sheriff or the Attorney General or Judge Ray to the effect that if he'd tell the truth he could go home?

A. No, sir. No, sir, I didn't—I didn't mean to infer that. No, sir.

Q. Did you leave Elizabethton, Tennessee, that night, after this alleged confession was given?

A. No, I stayed in—I stayed up here about three or four days.

Q. Did the sheriff ever tell you or did you learn from any other law enforcement officer that—whether or not Mr. Street had come in the morning to recant this confession, state it wasn't true at any time?

A. No, sir, I didn't know that.

Q. You were not made aware of that fact, if it did occur, by the sheriff or by Agent Collins?

A. No, sir.

[1125] Q. So your sole contact with this homicide is that you were in Elizabethton, Tennessee, on the night of September the 17th at 9:20 'til approximately 1:30 on the 18th, and you stayed in town two or three days?

A. Oh, no, I was with Collins more than that and—and I was—I was present when he interviewed Glenida Peele one time or Cliff Peele. One or both of them.

Q. Did the sheriff have Mr. Peele's confession with him on the night of this purported confession by Mr. Street?

A. I don't know that either. Not to my knowledge, but he could have.

Q. Now, you're saying the defendant's father stayed there the entire time?

A. He stayed in there the entire time that we were ta'king to him. His father got up and went out of the room once, and we discussed whether we should continue the—the interview or not out of the presence of his father, and we decided we should not continue it, and we did not until his father came back in the room.

Q. So it took you from 9:20 in—in the evening until 1:30 in the morning?

• • •

[1126] *** MR. BILL HAMPTON: Agent Huckeby, this purported confession on the 17th began, as far as you are concerned, at approximately what time, sir?

A. I want to think around 9:00, without looking at the statement. I—I'm not sure.

Q. And yet it lasted until 1:30 in the morning?

A. Yes, sir.

Q. Are you telling me that it took that amount of time to transcribe the purported confession of this defendant in this **[1127]** case?

A. We had several breaks. We ate sandwiches, drank Coke-Colas, coffee.

Q. Now, you're sure his father was there during the entire time?

A. During the taking of the statement. His father got up and left. His father either said he was feeling ill or felt like he was going to be sick or something, and he left the room. And we discussed whether to continue without him present or not, and we decided not to continue. And we waited until he came back in the room before the...

Q. Well, how many breaks are you talking about?

A. I don't know.

Q. During this time did you leave the room?

A. Did I leave the room?

Q. Yes, sir.

A. I left the room a time or two to go to the bathroom. But I'm—I don't know whether I left the room when his father did

or not. Really I don't.

Q. Was he ever left alone with Mr. Papantoniou to your knowledge after 9:20? Or do you know?

A. I don't know.

CLOSING ARGUMENT, GENERAL BROWN

* * *

[1140] *** Again, let's look at the defense, what Mr. Hampton says, that this defendant made the statement up, that there were threats from the sheriff. That the sheriff somehow read Clifford Peele's statement to him beforehand, coached him over and over again and he came in and with such tremendous dramatic coaching came in and cried to this officer and confessed to the crime. You've heard these—these various pieces of physical evidence, the circumstances, but you really had to be there to know what was going on. The fact that the house was entered by cutting the screen. The screen was cut on the right front window. He knew exactly what—which window was cut. He knew that the victim struggled. Not only did he **[1141]** know that, but in this confession he knew that the struggle was in the livingroom. Look at it. It's in there. He knew that Ben Tester's shirt was ripped in the struggle. He knew that the victim was gagged, and very importantly he knew that the sheet was torn—a sheet was torn to make that gag that was found in the victim's mouth.

He knew that someone climbed the tree. He says Eugene Montgomery. And of course the grass in the tree in the pictures indicates that. He knew exactly what kind of rope was used, that a white nylon rope was used. He used the words, plural, loops. He knew that there were more than one—there was more than one loop around this poor victim's neck. He knew that there was money taken from the wallet, knew that the wallet was thrown in the right front bedroom. He knew that the house was

searched. He mentioned in his statement the kitchen and the bedroom. He knew that the shirts were taken, and said that Jeff Causby took it, that Eugene Montgomery cut the phone—phone wires.

Ladies and Gentlemen, the real explanation, the only explanation of all these details is that this defendant was there. He saw it happen and he was describing what he saw.

In that statement on—on Page 8 he uses those words almost exactly, the last paragraph in Page 8, and I'll **[1142]** start toward the end of that—that paragraph. "The rope hung down. Clifford Peele tied the loops and put them over Ben Tester's head, down around Ben Tester's neck. Jeff Causby then ran, I don't know where he went." The next page on Page 9, "Clifford Peele and Eugene Montgomery eased Ben Tester off the tailgate to where he hung from the apple tree. I seen this happen." That, ladies and gentlemen, the defendant's own words, that is the explanation.

Now, defense counsel would come up here and say to you that, well, Clifford Peele had confessed the day before. And the defendant told you that the sheriff had him read over this statement three times. Here's Clifford Peele's statement; here's the statement that was made the day before. And that by coaching from the sheriff, by reading that statement over three times he was able to go in and give Agent Collins blow by blow, detail by detail of what happened. There are several problems with that. One of them is that—that Agent Collins, Agent Huckeby are there the whole time that this statement is being made. We've heard both of them testify the sheriff put no words into this defendant's mouth. But, look at this statement. You can look at Clifford Peele's statement. Nowhere in there will you find in Clifford Peele's statement that the screen was cut in the right front window. You will not find **[1143]** anywhere in Clifford Peele's statement that Ben Tester's shirt was ripped. Nowhere in there will you find that a sheet was used

for a gag. The only thing Clifford Peele says in this statement is that Joe Street came from somewhere and he had a gag. He apparently didn't know where Joe Street got the gag. Ladies and gentlemen, Joe Street knew where that gag came from and you've seen it here today. That a white nylon rope was used, describing the rope. That is nowhere, nowhere at all in this statement of Clifford Peele's. Take you time and look at it, if you wish. That money was taken from a wallet. You'll not find that in Clifford Peele's statement. You'll also not find that the wallet was thrown in the right front bedroom. Nowhere in Clifford Peele's statement.

Something interesting, there's no mention of shirts anywhere in this statement. Clifford Peele on the 16th didn't mention shirts being taken. And from this picture, even if Joe Street had seen it, you can't tell what was taken. Just an empty closet. But in his statement that you have there Joe Street knew that there were shirts taken, and he told who took them. Jeff Causby took the shirts.

The last point of similarity, that Eugene cut the phone wires. Well, the wires were cut. Clifford Peele doesn't say who cut them. They both agree that they do. The only **[1144]** thing you'll find in Clifford's statement is that Cliff was to cut the phone wires. So there—you have at least that small similarity.

It would have been utterly impossible if—if this man was the greatest dramatic coach in the world and—and Joe Street an actor that—ability to memorize, you couldn't get that many details right and the details aren't the same anyway. Joe Street gave Don Collins in that confession information he didn't have before. Information not in Clifford Peele's statement. The only way he knew that, ladies and gentlemen, was he was there, in the truck, standing there putting the noose around Ben Tester's neck.

* * *

CLOSING ARGUMENT, MR. BILL HAMPTON

* * *

[1160] *** Now, Mr. Brown's made some comments here concerning the difference in the statement given by Mr. Peele and the statement given by Mr. Street that I want to comment on. First of all, I want you people to take into consideration the fact that this homicide allegedly occurred on the 26th day of August of 1981. And the purported or alleged confessions were only obtained on the 16th and 17th. That there was widespread newspaper coverage of what happened, the man was hanged, there was a rope around his neck, the screen was torn, that the inside of the house had been ransacked. And remember also that the—that when Mr. Tester's son took the stand up here today he said, "Yeah, when I went up there after my father was hanged I **[1161]** told the officers and the sheriff that there were some shirts and things missing." Information that this man could have given to Mr.—to Mr. Street at any time prior to his confession.

Remember also that in Mr. Street's confession after this line, "The wallet was thrown into the right front bedroom I think, I'm not sure." Mr. Brown didn't tell you that. He wants you to think he's made a positive statement.

Now, isn't it strange that Mr. Collins of the TBI goes up there after this homicide and they comb the grounds and they go in the house and they do all sorts of tests. They take a vacuum cleaner with a special fiber for hairs or other items that would incriminate the defendant in this case. And in not one test do they have any evidence at all that incriminates Joe Street. Didn't find a thing. Did not find a thing. And, in fact, they cannot even prove the time of death, other than the statements that you've heard which they say that our client, Joe Street, gave. And the statement that they've put in this record of Mr. Peele. They don't know when Mr. Tester was hung. They just know that his wife (sic) saw him at 8:30 or quarter to 9:00. And that

the next day the little boy was walking to school and saw something in the tree. They don't know what time this occurred.

Mr. Brown wants you to discount every alibi witness **[1162]** that took the stand. Mr. Proffitt, his friends, the owner of the pool hall, the Causbys. He's suggesting to you that 14 people came up here and lied and perjured themselves on behalf of the defendant in this case. Of course, you're the best judge of the weight and credibility to be given to each individual statement. Including the sheriff's statement. And including Ray Williams' statement. A statement that was made three months after the homicide. A statement purportedly made when the defendant was in jail and had contact with the other co-defendants in this case.

And where is Clifford Peele? Where is the State's star witness? I'd like to know. I've been waiting for him for days. I've been waiting for him from last Monday to come testify in this case. Because I wanted to hear what he had to say to you. But the State didn't give me a chance to ask him any questions. And they didn't give you all a chance to observe his credibility and his demeanor on this stand. Oh, they got this statement before you when the sheriff put it in, but I didn't get a chance to ask him any questions, and believe me I wanted to ask him a few. And I wanted every one of you all to listen to his answer.

* * *

CLOSING ARGUMENT, MR. STUART HAMPTON

* * *

[1168] *** Now, let me say one thing at the start of this, let's suppose that there was no confession or admission in this homicide—what evidence does the State have other than this confession or admission to connect Joe Street with this murder of Ben Tester. What evidence has been presented to you in the

trial that would indicate that Joe Street is guilty of this crime. There is not one single bit of evidence to connect young Joe to this murder, other than his confession. They have **[1169]** not brought in a single piece of evidence. In fact, Agent Collins said that they had sent off eighty-six exhibits to the T. B. I., to the F. B. I.—they even swept the floor—they didn't find one single hair on his head to connect him to this murder. They have not found any fingerprint that would connect him to this murder. If you remember looking at those pictures it looked to me like that this house was ransacked and everything in there was touched by someone, and yet they didn't have one single fingerprint. In fact you talk about the rope, they went over, according to some of the evidence, this rope was bought—bought over at George Brown's Hardware. And they went over to the hardware and they took samples of all the rope at the hardware and sent them off to the T. B. I. and the F.B.I., and the F. B. I. came back and said that's not the same rope. It's obvious that the rope did not come from George Brown's Hardware, as they say it did.

* * *

[1180] *** But now let's get back to the conspiracy which they started. And I'll close with this. There is a man who knows all about this murder. There is a man who up until yesterday that I know of, is over here in the Erwin Jail—his name is Clifford Peele. And over our objections, they introduced this statement in this record, wherein Clifford Peele admits to the murder of Ben Tester. That man is available to the State of Tennessee to testify in this case, and why did they not use him? Can you say to yourself that there is no conspiracy and there is no cover up? If you say to yourself that even though they threatened Tiny Baily and Ken Proffitt here in the courthouse in Erwin, and if you say to yourself that they made no promises to Joe and they made no threats to Joe, why are they trying to cover up. What is it that he knows and can tell you? That they are trying to hide. Talk about conspiracy.

* * *

CLOSING ARGUMENT, GENERAL CROCKETT

[1183] GENERAL CROCKETT: May it please this Honorable Court, ladies and gentlemen of the jury, I'll take Mr. Hampton's argument in reverse order if you please.

He asked you to read the charge concerning an absent material witness. I want you to read that charge, because it says this; "When it is within the power of the State", and I notice on his copy that he has stricken the words; "or the defendant", that the judge will charge you; "or the defendant". "When it is within the power of the State or the defendant to produce a witness who has peculiar knowledge concerning the facts essential to a party's contention, and who is not, and who is available to one side to the exclusion of the other". In other words, one side could call him but the other couldn't. And therein lies the fallacy of that great dramatic argument of Mr. Hampton's. If Mr. Hampton wanted to produce Clifford Peele to you, he would indicate to you that the State has only access to Clifford Peele, that only the State can produce Clifford Peele, that only the State is a part of a great conspiracy to deceive you as members of this jury, has failed to call him.

THE COURT: Just a minute, General, I believe we have an objection.

MR. STUART HAMPTON: Excuse me. Your Honor please, I object to that argument, and I ask that you intruct them that **[1184]** the State has the witness, it's their witness, and it's not within my power to call him as such in this case.

THE COURT: Objection overruled.

GENERAL CROCKETT: So Mr. Hampton has set out to deceive this jury in his argument. I take it it was unintentional but he certainly while he was accusing us of a conspiracy was attempting to conspire with this defendant to deceive this jury and try to tell to tell you the law is something which it is not.

• • •

[1185] *** There has been conspiracy perhaps—there was conspiracy to take a man's life. And when this dumb kid, as Mr. Hampton characterizes his client, confessed in detail in that confession—detailed point, after point, after point, but no one unless they had been there and had seen it would have known. After this dumb kid confessed and told it and unburdened his soul, in the presence of his father—his mother waiting downstairs—the Juvenile Judge—Agent Huckaby, Agent Collins, the Sheriff of the County, Attorney General Brown—after he unburdened his soul and told that, and told it in great detail ten typewr—ten handwritten pages that it went out—ten pages, **[1186]** After this dumb kid poured his soul out and told the truth, one day after Clifford Peele had confessed to the Sheriff, and when he was confronted with the knowledge that his co-defendant, his co-conspirator, his co-actor, one of them, had broken and confessed, and then on the 17th, he comes up and gives all of this information—the statement that you have here, and you've all had an opportunity to look at it—it tells in detail how they entered into the house, tied the gag, su, subdued Mr. Tester, after this dumb kid said that, what did this dumb kid do the next day. He called the Sheriff, and he didn't say I want to withdraw my confession—my lawyer said to tell you it's not true, that I want to withdraw my confession.

• • •

[1192] *** Finally on December—on September the 16th, five days after he had made this statement admitting his knowledge, the Sheriff is still continuing his investigation, along with Agent Collins, and it finally breaks—Clifford Peele gives a statement. The statement that has been introduced here today. And in that statement Clifford Peele details the hanging of Ben Tester. And in the issuing of that statement, the name of Clif—of—of Joe Street is prominent. So the Sheriff does what he should do, he—well in fact he apparently didn't have to do it, because the word must have been out among the community and among some of these young people, because the testimony

was—remember this defendant was not in jail at that time. Do you recall the testimony of the Sheriff on direct examination—on—on, when he was examined on rebuttal, that Joe Street called him, contacted the Sheriff's Department and said I want to talk to you and the Sheriff dispatched a patrol car up to his house to get him and bring him to the Sheriff's Department. This is another error of the defense argument. They would have you believe that the only reason the defendant made this statement was so that he **[1193]** could go home. Well, the defendant was home before he ever came to the Sheriff's Office. He wasn't arrested. The Sheriff didn't go out and get him. He sent for the Sheriff, and the Sheriff dispatched a deputy for that purpose. And when he was brought there and he talked to the Sheriff on the evening of the 17th, his statement was clear; "I want to confess. I want to unburden my soul. I want to tell you the truth. You're getting close to it. You know the truth from Clifford Peele, because you showed me his—where he had signed a confession. I'm ready to confess." And confess he did, and you've read that confession.

• • •

[1195] *** 9:15, 9:30, 9:45, in that area. Just the time that there is a hole in the defendant's alibi, just at the time when these witnesses that he produced, who he claimed saw him took the stand and said no he wasn't there. Just at that time when they were in searching the home when the lights come on, and that's when Ben Tester came in on them, and was knocked to the floor. No one knew—Joe Street certainly wouldn't have known—this high school drop out, are we to believe that he would have given all this information from being coached by the Sheriff, because that's what you've got to believe. He's certainly not the kind of fellow that would have picked all of this up from reading the Saturday—the afternoon news paper. We're to believe that he's eighteen years old, seventeen and a half years old, a high school drop out which indicates—which is indicated on one of these exhibits. He's not the kind of fellow that's go-

ing to be running around reading the afternoon paper to get that. Besides that, he's never said that he got any of this information from the newspaper, the news media. He said he got it all from the Sheriff that night. But he knew the shirt of Ben Tester was ripped—which was true. You can look at the photographs and see. You know that the front lights were on, and certainly they were that night. He knew that it was shite nylon rope, and there's no statement at all in **[1196]** Clifford Peele's statement--I've read it very carefully, and I ask you too if you have any doubt about it, he said, he mentions a rope, but never a white nylon rope, and that is white nylon rope that was taken from the neck of Ben Tester. That the screen was cut on the right front window—not in the statement—not at all in the statement of Clifford Peele. I believe that he mentions that the screen was cut, but he doesn't say which window it was. But the investigation of T.B.I. Officer Collins indicates that it was the right front window. That a sheet was torn to make a gag—a sheet found in the house was torn to make a gag—not in the statement of Clifford Peele anywhere. But it's in the statement of Joe Street, and it's the truth, according to the testimony of Officer Don Collins. That a wallet—money was taken from a wallet, and that wallet was thrown in the right front bedroom, I think. And that's exactly where the bed—where the wallet was found, and it was empty of money—not in the statement of Clifford Peele. He tells basicaily the same story of the assault on Mr. Tester, of knocking him to the floor, of knocking him unconscious, but the little details are different. The—The details given by Joe Street match with that which was found by the T.B.I. Agent and the Sheriff. He knew that someone, and he said Eugene Montgomery climbed the tree—how could he have known that—that these **[1197]** officers in making a search found the grass from the ground, up in the tree limb. How could he have known that? Even if you showed him...

MR. WILLIAM HAMPTON: Your Honor, I object to the comment grass in the tree. I don't believe there's been any evidence in...

THE COURT: Objection overruled.

GENERAL CROCKETT: Well, it's overruled, but you can look at it, and if that's not grass, that's something that's not—I'm not a ornithologist, but I can assure you—or a botanist, but I can assure you that there is some substance in that true, that didn't grow there. You can look at the photographs and form your own conclusions. I believe that the testimony from the officers was that they found grass in the tree, up in a tree limb of that little old hanging apple tree. Even you'd seen those photographs, you wouldn't have known what that was. But he said that Jo—that Eugene Montgomery climbed the tree and looped the rope around the limb. A fact that is not—I believe that fact was in—in the statement of Clifford Peele. He makes reference to loops—loops of rope. When you think of hanging a person, I would think of a single loop, but he knew that there was a double loop around the neck of Ben Tester. He knew that a struggle had occurred in that house and **[1198]** that it had occurred in the living room. Something that was not in—not entirely in Peele's statement. He knew that Mr. Tester had the money to buy a new car. He even knew that Eugene—and he said that in his statement, and it's not mentioned anywhere else, that Eugene took a pillow out of the bedroom and brought it into the living room to perhaps smother Mr. Tester. I believe that it was Agent Collins who said that a pillow was found in the living room.

• • •

INSTRUCTIONS TO THE JURY

• • •

[1209] *** In this case you are considering the following:

(1) Murder in the First Degree,

(2) Murder in the Second Degree,

(3) Voluntary Manslaughter,

(4) Involuntary Manslaughter,

(5) Attempt to commit a Felony.

The last four are lesser included offenses.

You may find the defendant guilty of only one of the above offenses, if you so find beyond a reasonable doubt. If you find him guilty of any of the above, you should so name the offense, as well as the punishment.

You may of course find the defendant not guilty of any of the above, and you should so find if you have a reasonable doubt, in which case your verdict will be not guilty.

If you find the defendant guilty beyond a reasonable doubt of (1) premeditated killing, as hereinafter defined, or (2) murder in perpetration of a felony, also hereinafter defined, then he is guilty of murder in the first degree.

Homicide: First Degree Murder (Premeditated Killing)

Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

For you to find the defendant guilty of murder in the **[1210]** first degree, the State must have proven beyond a reasonable doubt:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was malicious, that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victim was killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption;

(3) that the killing was willful; that is, that the defendant must have intended to take the life of the alleged victim;

(4) that the killing was deliberate; that is, with cool purpose; and

(5) that the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exist in the mind **[1211]** of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. Passion does not always reduce the crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited when the design was carried into effect.

If you find from the proof beyond a reasonable doubt that the defendant is guilty of murder in the first degree, you will so report and your verdict in that event shall be; "We, the jury, find the defendant guilty of murder in the first degree."

[1212] Murder in the First Degree also includes Murder in Perpetration of a felony. Homicide: First Degree Murder. (In perpetration of a felony).

A person who commits — a person commits murder in the first degree, as charged in this case, if he kills any person during the perpetration of, or attempt to perpetrate any Burglary. For you to find the defendant guilty of murder in the first degree, as charged, the State must have proven beyond a reasonable doubt:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was committed during the alleged perpetration or attempt to perpetrate the alleged burglary, hereinafter defined, and;

(3) that the defendant specifically intended to commit the alleged burglary.

If you should find beyond a reasonable doubt that the defendant killed the deceased during the perpetration of, or during an attempt to perpetrate burglary as alleged, and that the defendant specifically intended to commit the alleged burglary, it is not necessary that the State prove an intention to kill, or that the alleged killing was done willfully, deliberately, with premeditation, and with malice.

To render the alleged killing murder in the first **[1213]** degree, the alleged killing must have been done in pursuance of the unlawful act of burglary, and not collateral to it; that is, the alleged killing must have been closely connected with the alleged burglary, and not a separate, distinct and independent event.

If you find from proof beyond a reasonable doubt that the defendant is guilty of murder in the first degree, you will so report and your verdict in that event shall be: "We, the jury, find the defendant guilty of murder in the first degree."

Burglary — First Degree. Burglary is the — burglary in the first degree is defined as breaking and entering a dwelling house or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodg-

ing, either permanently or temporarily, and whether as owner, renter, tenant, lessee, or paying guest, by night, with the intent to commit a felony.

Punishment: Determinate Sentence. If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant is guilty of murder in the first degree, it shall be your duty to fix his punishment, which, as provided by law, shall be imprisonment in the penitentiary for life. This type of sentence is called a determinate sentence.

If you find the defendant not guilty of murder in the first degree, or if you have a reasonable doubt as to his **[1214]** guilt of this offense, then in that event you must acquit him of this charge.

• • •

[1225] • • • Aiding and Abetting.

All persons present, aiding and abetting, or ready and consenting to aid and abet in any criminal offense, shall be deemed principal offenders and punished as such.

Mere presence at the scene of the crime, however, would not make a defendant a principal. There must be some evidence, at least circumstantial, that he participated in the crime. The law does not require a strict, actual, eyewitness presence. Rather, if at the time of the commission of a crime, a defendant was assenting to it, was in a position to aid the perpetrator, and was ready and willing to give such aid if necessary, then he can be considered to be an aider and abettor in the commission of the crime.

[1226] Confessions.

Evidence of a confession has been introduced in this case.

A confession is a statement by the defendant that he engaged in conduct which constitutes the crime charged and is an acknowledgement of guilt itself.

The Court has ruled that the confession is admissible in evidence, but it is your duty to judge its truth. In so judging, you should consider the circumstances under which the confession was obtained as well as any evidence which contradicts all or part of the statements made. You must consider all the statements made by the defendant, whether favorable or unfavorable to him, and you must not disregard any of them without good reason. If the evidence in the case leads you to believe that the confession or any part of it is untrue or was never made, you should disregard it or that portion which you do not believe.

You are the sole judge of what weight should be given to those portions of the confession which you believe, and you should consider them along with all other evidence in the case in determining the defendant's guilt or innocence.

• • •

[1227] • • • Express Admissions against interest.

Evidence of an admission has been introduced in this case. An admission is an acknowledgement by the defendant of certain facts which tend, together with other facts, to establish his guilt. An admission is not sufficient in itself to support a conviction; it must be corroborated by other independent evidence to warrant and support a conviction.

The Court has permitted admission of this evidence, but it remains your duty to decide if in fact such statement was ever made. If you do not believe it was made, you should not consider it. If you decide the statement was made, you must then judge the truth of the facts stated. In determining whether the statement is true, you should consider the circumstances under which it was made. You should also consider whether any of the other evidence before you tends to contradict the statement in whole or in part. You should not arbitrarily disregard any part of the statement, but should consider all of **[1228]** the statement you believe is true.

If you find that the statement is true, you are the sole judge of the weight that should be given it. You should consider it along with all other evidence in the case in determining the defendant's guilt or innocence.

* * *

Absent Material Witness.

When it is within the power of the State or the defendant to produce a witness who possesses peculiar knowledge concerning facts essential to that party's contention and who is **[1229]** available to one side to the exclusion of the other, and the party to whom the witness is available fails to call such witness, an inference arises that the testimony of such witness would have been unfavorable to the side that should have called or produced such witness. Whether there was such a witness and whether such an inference has arisen is for you to decide and if so, you are to determine what weight it shall be given.

The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.

I instruct you that such can be considered by you for rebutable purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever.

* * *

[1238] * * * MR. STUART HAMPTON: We make the statement again to get it on the record, that I again object to the jury being presented with Peele's alleged confession, which is Exhibit Number 42 — I object to the jury being presented with Exhibit 42 and being allowed to read it before they retire.

THE COURT: Objection overruled.

EXHIBIT 38

CARTER COUNTY SHERIFF'S DEPARTMENT
GEORGE PAPANTONIOU, SHERIFF
ELIZABETHTON, TENNESSEE 37643
Phone: 542-6921 · 926-7081

DATE: 9/17 1981.
TIME: 9:20 P.m.

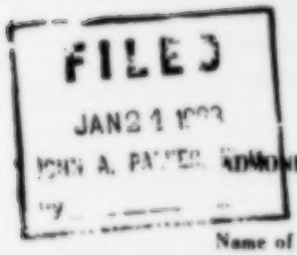
JUVENILE INTERVIEW/INTERROGATION WAIVER

SUBJECTS NAME: Harvey James Street (Joe).
SUBJECTS ADDRESS Rt #2 Tinker Hill Rd. Hampton, TN.
DATE OF BIRTH: May 2, 1964 Carter County, TN.
HEIGHT: 5'8".
WEIGHT: 140 LB.
HAIR: Blond.
EYES: Blue.
BUILD: Short/Stocky
SCARS &MARKS: "Joe" with heart/ARROW L-Bicep (Tester)
SCHOOL OR OCCUPATION: Hampton High School - Sophmore.
MOTHER: Janice Street.
FATHER: Maynard Billy Street.
ATTORNEY: Stuart Hampton PRESENT: No.
I (MOTHER/FATHER) X M B Strut HEREBY ALLOW
SHERIFF/DEPUTY, TBI SA Don Collins INTERVIEW/INTERROGATE
MY SON/DAUGHTER X Harvey James Street CONCERNING AN OFFICIAL
INVESTIGATION BEING CONDUCTED BY THIS DEPARTMENT CONCERNING THE
OFFENSE OF Homicide Ben W. Tester IN CARTER COUNTY, TENNESSEE
ON 8/26 19 81.
WITNESSED X D Con R. Collins SIGNED X M B Strut

T.B.I. CASE FILE # S-2186
EXHIBIT # 21

FILED
JAN 24 1983
JOHN A. PALMER, Clerk

EXHIBIT 39



T.B.I. CASE FILE # 5-2186
EXHIBIT # 22

Name of Agency Tennessee Bureau of Investigation

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

If you decide to answer any questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coersion of any kind has been used against me.

Signed X Joe Street

Place Carter County Sheriff's Office

Date 9/17/81

Time 9:27 P.M.

Witness Dan R. Collins, SA, T.B.I.

Witness John C. Shaw SA TBI

Time 9:27 P.M.

M.B. Street

Sniff & Carter Co.

EXHIBIT 40, STATEMENT OF HARVEY J. STREET

Statement

Date: 9/17/81
Time: 9:27 P.M.

HARVEY JAMES STREET (JOE) (Juvenile)
Rt. #2 Tinker Hill Rd.
Hampton, TN
W/M DOB 5-2-64 (age 17)
5'8"
140 LB
Blond hair
Blue eyes
Build Short/stocky

On Wednesday August 26, 1981 after I got up sometime around 8:30 A.M. or 9:00 A.M. Cliff and Glenida Peele came to my house in Hampton on Tinker Hill.

Cliff Peele ask me who were some of the old people that lived on the hill that they could break into their houses. I told Cliff Peele Rainbolt, Miss Woods, old man Phillips and Ben Tester. Cliff Peele ask me who all went to church. I told Cliff Peele that Ben Tester went to church all the time. Cliff Peele ask me where Ben Tester lived. I told him the green house down below me over next to the woods. Cliff Peele said that would be a good place because if anyone comes we could run into the woods. Cliff Peele said that he heard that Ben Tester had some gold and a gun in the house. Cliff ask me if I thought Ben Tester had any money in the house. I told Cliff Peele that my mother, Janice Street had told me that Ben Tester was supposed to have $10,000 to buy a new car. Cliff Peele told me if we got the money we could get a couple pounds of pot and some acid. That we all would go to Indiana and we could get by with it.

I told Cliff Peele that I did not want to talk about breaking into Ben Testers in front of Glenida. I was afraid that she might tell on us.

As we were coming off the Hill (Tinker Hill) the conversation was still going on between us. Cliff started to stop and back up. I told Cliff not to do that because it wasn't cool to do that now. Cliff said okay that we would wait until tonight.

Cliff ask me if I was, "willing to do my part." I ask Cliff Peele what he meant. Cliff said, "Are you going to help us whip him?" I told Cliff, "No." Cliff said, "if we have to we will kill him." This was if Ben Tester came in while we were there.

Cliff ask me if Ben Tester was pretty old. I told Cliff he was not that old.

Cliff Peele told me we needed to get some money to buy pot with.

Cliff Peele, Glenida, and I went to Dave Whites house and stole a drill, skillsaw and an extension cord. Went to the Antique Shop under Kyle Campbells. Sold the skillsaw, drill and extension cord. Cliff stole an extension cord at the antique shop. We went to Austins beer store. Glenida got out to try and sell the extension cord. While Glenida was in Austin's, Cliff Peele ask me to call someone to help us break in Ben Tester's. Glenida come back to the car. We then went to the tire recapping place to sell the extension cord. We then went to Wallace Ishoms house on the Lake (Watauga) broke in stole some guns. Left the house, went straight to Donald Grants house where we sold the guns for one hundred and something dollars. This was around 12:30 PM. or 1:00 PM. 8/26/81.

We then went to the Valley Forge Pool Hall where we met Jeff Causby. Ask Jeff Causby to get us some pot, gave him $35.00. Jeff left to go get the pot. While he was gone to get the pot, Cliff and I sat on the tailgate and talked. Cliff kept talking

about the $10,000. I told Cliff that Ben Tester went to church on Wednesday night. Cliff ask me what time he came home from church on Wednesday night. I told him I didn't know. We had talked about Ben Tester going to church earlier in the day as we were coming off the hill from my house.

This is not true JS

There was no conversation about meeting at the "Big K." Cliff told me to be at the pool Hall so he could get hold of me to go to Ben Testers.

This is not true JS

Jeff Causby brought the "pot" back. Jeff split the "pot" between Cliff and I. We did not let Jeff Causby know about the plan to break in at Ben Testers. We did not tell Jeff Causby anything.

We left Jeff Causby at the Valley Forge Pool Hall. I told Jeff Causby I would be back about 6:00 PM. or 6:30 PM.

We, Glenida, Cliff and I went to a pawn shop to sell the rings. The man would not but them. He told us A.A. Phillips would buy them. He gave us directions to Mr. Phillips house. We went to the residence of A.A. Phillips on "E." Street. Cliff sold the two rings taken from Wallace Ishoms house for $42.50. We then went to Long John Silvers and ate. Cliff and Glenida took me back to Valley Forge Pool Hall. I walked to Jeff Causbys house. Cliff told me to be at the pool hall that he would come and get me to go to Ben Testers. This was around 6:30 PM or 7:00 PM. 8/26/81.

I got with Jeff Causby at his house. We went up to Hampton in Jeff Causby's Dads blue Chevrolet pick-up truck. We drove around and smoked some pot. We went up on the switchback.

I called Eugene Montgomery and Jeff Causby from my house earlier that day. Jeff and Eugene agreed to break into Ben Testers. I told them to be down around the pool hall. I asked Eugene Montgomery if he would get a car or truck somewhere. Eugene said he would steal a truck someplace.

Cliff Peele said he would take Glenida to Johnson City and leave her at the go-cart place and meet me at the "Big K" in Elizabethton at about 8:30 PM.

Earlier that day when Glenida went in Austin Beer Store to sell the extension cord, Cliff told me to go home and call someone to help us at Ben Testers. Also told me to buy some rope. I guess he was going to use the rope to tie down stuff stolen at Ben Testers. I got $3.00 from the glove compartment. Glenida come out of the store. Cliff and Glenida took me home. Later I called Tiny Bailey on the phone. I told Tiny Bailey to meet me at the foot of Tinker Hill. I walked to the foot of the hill and on over Bramaer Castle and met Tiny Bailey. I gave Tiny Bailey $3.00 and told him to go buy some rope and bring it back to me or hide it. Tiny Bailey told me that he would hide the rope at the car wash in the bottom of the old vaccum cleaner where the door was.

Jeff Causby and I drove to Al's pool hall in Jeffs Blue Chevrolet truck just before 8:00 P.M. We picked Eugene Montgomery up at Al's. Eugene told Jeff and I that he had stole a pick-up at a shop down behind Brown's hardware and had parked it at Hampton High School. Jeff, Eugene and I drove Jeffs Blue Chevy truck to Hampton High School parked it and got in a white 1971-72 Chevrolet pick-up truck, long bed with a white canvas top on the bed. The truck had a red stripe around the sides of it.

Before leaving the pool hall I told Gary Street that Jeff, Eugene, Cliff and I were going to break-in Ben Testers, for him and Tiny Bailey to meet us at Hampton High School. That we would smoke some pot when we got back.

Eugene, Jeff and I went to the "Big K" in Elizabethton. Got there about 8:30 P.M. Cliff Peele didn't show up for a few minutes. Cliff Peele drove up in his El Camino. There was a guy with him. Some Miller guy. He sat in the truck. We (Eugene Montgomery, Jeff Causby and I) left the "Big K." Eugene Montgomery was driving. The Miller guy and Cliff Peele

followed us to the car wash at Hampton. We stopped at the car wash. I got the rope out of the vacuum cleaner. Cliff Peele got in the truck with us. The Miller guy stayed in Cliffs truck at the car wash.

Eugene Montgomery drove Cliff Peele, Jeff Causby and I to Ben Testers house in the stolen white truck sometime between 9:00 & 9:30 PM. 8/26/81. Just as we got to Ben Testers driveway, Jeff Causby cut the headlights out. Eugene Montgomery backed the truck up Ben Testers driveway parking it between the apple tree and the front porch in the driveway. All four of us got out of the truck. I stood near the front steps on the truck side. We all went up on the front porch. Looked in the front windows, seen that no one was home. No lights were on in the house. The window on the right front near the front door was up. It had a screen on it. Clifford Peele started to just cut a hole in the screen with my knife. A black handle case double XX I had stolen from Wallace Ishoms house. Eugene Montgomery got the knife and cut the screen all the way out. Eugene Montgomery, Cliff Peele and Jeff Causby went in the window. I stayed outside awhile, then I went in the house through the window. Eugene Montgomery and Clifford Peele searched the Right front bedroom. When we first entered the house Jeff Causby and I went to the den to look around. Eugene Montgomery cut the telephone line. Cliff Peele got the kitchen. Eugene Montgomery search the living room. We had been in the house about 10-15 minutes when Cliff Peele said someone was coming. (Clifford had turned the den light on before Ben had come in) Ben Tester came in the front door. Cliff Peele grabbed Ben Tester and threw him to the floor. Ben Tester was struggling trying to get up saying, "who is it, let me go." Ben Tester said this several times. Ben Tester quit struggling. I thought he had a heart attack or something. Ben Tester was lying near the front door on his stomach. Cliff Peele said, "he must have the money on him." Cliff Peele ripped Ben's Testers shirt open and began searching his pockets. I ran out the front door. Clifford Peele came out behind. I went to the truck. Cliff Peele came to

the truck. I kept telling Cliff, "let's get out of here." Cliff Peele said, "No, we're going to string him up." Cliff Peele got a white nylon rope from under the front seat. Eugene Montgomery came out to the truck and said, "It's time to quit fooling around we're going to hang him." Cliff Peele said, "We're going to make it look like suicide." Eugene Montgomery said the same thing. We all went back in the house. I tore a piece of sheet to make a gag. The sheet was on the chair in the den. I put the gag in his (Ben Testers) mouth. Eugene Montgomery tied the knot. Ben Testers mouth was slightly open, but his tongue was not sticking out. Eugene Montgomery told me he was going to whip my ass if I did not gag Ben Tester.

Eugene Montgomery took Ben Testers wallet out of his pants. Eugene got $37.00 out of Ben Testers wallet. The wallet was thrown into the Right front bedroom floor I think, I'm not sure.

Eugene Montgomery and Clifford Peele carried Ben Tester out of the house by the arms and feet. Eugene Montgomery let the tail gate down on the truck. Cliff and Eugene layed Ben Tester on the tailgate. Cliff Peele got in the truck and backed it up to the apple tree. Cliff Peele and I got up in the truck. Eugene Montgomery climbed up in the tree and tied the nylon rope around the tree limb. The rope hung down. Cliff Peele tied the loops and put them over Ben Testers head down around Ben Testers neck. Jeff Causby then ran. I don't know where he went. Clifford Peele and Eugene Montgomery eased Ben Tester off the tailgate to where he hung from the apple tree. I seen this happen. I kept telling them lets get out of here. Clifford Peele kept laughing saying, "Look at that son-of-a bitch hanging." Eugene Montgomery, Cliff Peele and I left in the pick up truck. Let Cliff Peele out at the Hampton Car Wash. He and the Miller guy left and went to Johnson City. Eugene Montgomery and I went to Hampton High School and met Jeff Causby, Tiny Bailey and my brother Gary Street. Smoked some pot with them. Eugene left us in the stolen white pick-up truck alone. Jeff Causby and I took Tiny Bailey and Gary to my cousins,

Gregg Banners and let them out. Jeff and I went to Ken Proffits house and picked him up. Bought ½ case of beer at Austins. Drove to Switch Back. Looked toward the valley to see if the law was going to Ben Testers.

While at Ben Testers Eugene Montgomery took checks belonging to Ben Tester. Eugene borrowed Jeff Causby License. Eugene Montgomery cashed Ben Testers check at Valley Forge someplace. Jeff Causby took shirts from Ben Testers. A sheet from a chair was thrown in the back of the truck. The shirts and sheet was thrown off a cliff at the first switch back. Before carrying Ben Tester outside Clifford Peele wanted a pillow to smother Ben Tester with. Eugene Montgomery brought Cliff a pillow from the bedroom. Cliff then said he didn't need it.

Signed: /s/ Joe Street
Date: 9-18-81
Time: 1:20 AM

Witnessed /s/ S.A. Don R. Collins, T.B.I.
Witnessed /s/ [illegible] Sheriff.
Witnessed /s/ Preston Huckeby, T.B.I.
Parent: /s/ M B Street

In addition, Cliff Peele tried to give me $6.00 from Testers wallet. He said he was going to keep $10.00. Eugene Montgomery gave Cliff Peele $16.00 from Testers wallet.

The opinion of the Tennessee Court of Criminal Appeals was reproduced in the Appendix To The Petition For Writ Of Certiorari (Pet. App. A-1 - A-12), and has been published at 674 S.W.2d 741.

No. 83-2143

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE, PETITIONER

v.

HARVEY J. STREET

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether respondent's rights under the Confrontation Clause were violated by the reception in evidence of his nontestifying accomplice's confession (which also incriminated respondent) solely for the purpose—underscored by appropriate limiting instructions—of rebutting the respondent's testimony that his own confession, also received in evidence, was a coerced imitation of the accomplice's confession.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2143

STATE OF TENNESSEE, PETITIONER

v.

HARVEY J. STREET

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents a significant question as to the application of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), and more generally, the proper analysis of claims under the Confrontation Clause. As this case well illustrates, misapplication of the teaching of *Bruton* may seriously threaten the truth-seeking function of a criminal trial. In part because of the absence of a majority opinion in *Parker* v. *Randolph*, 442 U.S. 62 (1979), there is evidently uncertainty as to the proper scope of the *Bruton* rule. The resolution of the question presented in this case and the general approach taken to the Confrontation Clause issue will affect federal criminal prosecutions.

STATEMENT

Following a separate jury trial upon an indictment charging him and five others with murder in the first de-

gree, respondent was convicted of that offense and sentenced to life imprisonment. The Tennessee Court of Criminal Appeals reversed the conviction, concluding that the reception in evidence at respondent's trial of the confession of a non-testifying accomplice violated respondent's rights under the Confrontation Clause as interpreted in *Bruton* v. *United States*, 391 U.S. 123 (1968) (Pet. App. A1-A12). The Supreme Court of Tennessee denied the State's application for permission to appeal without opinion (Pet. App. A13).

1. Some time during the night of August 26, 1981, Ben Tester was murdered by burglars who hanged him and ransacked his home in Hampton, Tennessee. On February 22, 1982, the grand jury for Carter County, Tennessee charged respondent, along with five others, with the first degree murder of Tester, charging both that the murder was premeditated and that it was committed in the course of the felony of burglary (J.A. 4-5). Another accomplice, Clifford Peele, was charged separately in connection with the murder of Ben Tester. On the State's motion, respondent's case was severed for purposes of trial from those of his accomplices (J.A. 4).

Prior to trial, respondent moved to suppress an incriminating statement he had made to agents of the Tennessee Bureau of Investigation and other law enforcement officials on September 17, 1981. Following an evidentiary hearing, the motion was denied, the court holding that "the confession of Harvey Joe Street was knowingly, voluntarily and intelligently given" (J.A. 7).

2. a. The prosecution's affirmative case against respondent was built around respondent's confession, which was read to the jury by Tennessee Bureau of Investigation Agent Collins and introduced as an exhibit (see J.A. 25-26, 353-360), and the testimony of investigators concerning the crime scene that tended to corroborate the details of respondent's confession.[1] In that confession re-

[1] We understand that the State had also planned to use Clifford Peele, who was under indictment for the crime but who had not yet been tried, as a witness, pursuant to a cooperation agreement he had reached with the prosecution providing that the State would not seek the death penalty. Pursuant to this plan, Peele was transported to the Unicoi County jail during respondent's trial, so as to make him available as a witness (see J.A. 7). We are advised by the State that the prosecutor decided at the last minute not to call Peele as a witness, because he appeared unreliable and it was feared that he might end up asserting his privilege against self incrimination, as he in fact did at subsequent trials of other participants in the Tester murder and burglary.

spondent described how he and Clifford Peele planned a burglary of Ben Tester's home in order to secure money to buy a large quantity of illegal drugs. Respondent related that he had told Peele that he was unwilling to "help * * * whip" Tester if he were to interrupt them during the burglary (J.A. 354). He described the day before the crime in considerable detail, relating a series of minor thefts designed to secure goods that could be pawned for drug money, interspersed with preparation for the Tester burglary (J.A. 354-356). Respondent then described the burglary in detail. While the burglars were ransacking Tester's house looking for a large sum of cash they believed to be secreted, Tester walked in. Peele assaulted Tester. According to respondent's statement, he "kept telling Cliff 'let's get out of here,'" but Peele replied "'No, we're going to string him up'"; respondent then assisted in gagging Tester (J.A. 357-358). In his September 17 confession respondent acknowledged accompanying his accomplices outside the house, where they proceeded to hang Tester by a rope from an apple tree, but in that account he played a relatively passive role in the actual hanging (J.A. 358). Subsequently, however, on June 27, 1982, respondent gave a further statement, related at trial by a witness thereto, in which he acknowledged having helped to place the noose around Tester's neck, although he claimed to have done so under some duress (J.A. 76).

b. Respondent's defense case was based upon presentation of alibi witnesses who placed him at locations other than the scene of the crime on the evening of the crime,

and on his testimony in his own defense. Respondent's testimony was generally that he had no knowledge of the crime and that his confession was false, being a coerced imitation of a statement that had previously been given by his accomplice, Clifford Peele. Defense counsel introduced this theme even before the defense case commenced, during the cross-examination of Agent Collins. Defense counsel elicited from Collins the fact that Clifford Peele had confessed to the crime (J.A. 30-31, 40, 50). Defense counsel then sought to have Agent Collins read Peele's confession to the jury.[2] The State objected on hearsay grounds. Defense counsel responded (J.A. 41):

> Your Honor please, it's very material to the defendant to get this statement of Mr. Peele before this Jury and to question [Agent] Collins concerning this statement and how it is the same or similar to the statement of my client, Joe Peele [sic], that has been read into the record.[3]

The trial court sustained the hearsay objection, observing (J.A. 41-42): "If you want Mr. Peele to state what he knows about it you can call Mr. Peele."

When respondent took the stand, he testified that he had been coercively interrogated, and had decided to confess in response to this interrogation. He claimed that the portions of his statement that accurately described details of the crime had been borrowed, under coercive pressure from the sheriff, from the statement of Peele, which had been repeatedly read to him. J.A. 186-194. He asserted that whenever his unfolding statement diverged from Peele's the sheriff would accuse him of lying and demand that he replicate Peele's account (J.A. 194). Moreover, during the direct examination respondent's counsel inquired of his client (J.A. 190):

---

[2] The defense may have still expected at this point that Peele would testify as a prosecution witness. See page 2 note 1, *supra*.

[3] So far as we can discern from the record this argument was made in open court in the presence of the jury.

> Q. And of course that statement of Clifford Peele's implicated you?

Respondent answered in the affirmative (*ibid.*).

c. To rebut respondent's claim that his confession was false and extracted from him by coercive pressure to replicate Peele's confession, the prosecution called Sheriff Papantoniou, who recounted respondent's interrogation. Papantoniou denied respondent's allegations regarding the interrogation, and specifically denied that respondent had been read Peele's statement or that he had been pressured to confess in terms consistent with Peele's confession. Papantoniou further testified that he had not supplied respondent with any of the detailed information concerning the crime contained in respondent's statement (J.A. 270-277, 291).

In connection with Sheriff Papantoniou's rebuttal testimony concerning the genesis of respondent's confession, the prosecution sought to offer Peele's statement in evidence (J.A. 282). The prosecutor explained that the statement was not offered to be considered as evidence of its truth, but to undercut respondent's claim that he had been "fed" the details of his statement, by showing that respondent's statement included details concerning the crime and the crime scene that were not in Peele's statement. The prosecutor argued that, as employed for this limited purpose, Peele's statement was not hearsay, as the defense claimed in objecting to the reading of Peele's statement (J.A. 282-283, 285-288).[4] The trial court concluded (J.A. 286-288) that, because the State offered Peele's statement solely for the purpose of re-

---

[4] To the defense's suggestion that the prosecution could call Peele as a witness, the prosecutor explained (J.A. 282-283): "The defense has raised this issue and they have opened the door to permit us to do this. We are not introducing this statement for the facts contained therein * * * [but] to show that the sheriff could not have had knowledge of certain items that were contained in the [respondent's] statement on the 17th because on the 16th when Clifford Peele gave him this statement those facts were not in that statement." See also J.A. 286.

butting respondent's claim that his confession was a coerced imitation of Peele's statement, that statement was not hearsay and its reception did not conflict with the teaching of *Bruton* v. *United States*, 391 U.S. 123 (1968). Before the statement was received, however, the court twice instructed the jury that it was allowed "not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only" (J.A. 292, 293).

Sheriff Papantoniou then proceeded to read Peele's September 16 statement to the jury (J.A. 295-303); the written statement was also introduced in evidence as an exhibit (J.A. 290-291). Peele's account of the genesis of the crime and its commission was generally in accord with the respondent's statement, although Peele perhaps attributed a somewhat more active role in planning the crime to respondent than respondent had acknowledged in his own statement, and portrayed respondent's role in the hanging of Ben Tester as a somewhat more active one than respondent acknowledged in his statement of September 17, 1981.[5] Following the reading of the confession, the prosecution asked the sheriff whether seven particular details regarding the commission of the crime —each of which was in respondent's statement—were reflected in Peele's statement (J.A. 303-304).[6]

The prosecution referred to Peele's statement in its summation only in disputing respondent's claim that he had been pressured into replicating Peele's statement.

[5] Peele stated that he and respondent together "put the loops [of rope] around Ben Tester's head and down around his neck" and that he and respondent together lifted Ben Tester off the tailgate of the pickup truck where he had been carried and allowed rope to tighten around his neck (J.A. 302). As noted above, respondent himself had acknowledged participating in placing the noose around Tester's neck in his statement on June 27, 1982. See page 3, *supra*.

[6] These include the ripping of Ben Tester's shirt, the color and composition of the rope, the source of the gag placed on Tester, and the taking of money from Tester's wallet and shirts from his home (J.A. 303-304).

The prosecutor emphasized the numerous significant details of the crime that appeared solely in respondent's statement, arguing that the only plausible conclusion was that respondent knew these details from his first-hand knowledge of and participation in the crime (J.A. 335-336, 343-344). In his summation defense counsel emphasized that Clifford Peele had not been called as a witness (J.A. 338):

> Oh, they got this statement before you when the sheriff put it in, but I didn't get a chance to ask him any questions, and believe me I wanted to ask him a few.

See also J.A. 339.[7] In instructing the jury the court stated (J.A. 350):

> The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.
>
> I instruct you that such can be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever.

3. Respondent took an appeal from the judgment of conviction entered on the jury's guilty verdict (J.A. 8). On appeal respondent argued (App. Br. 15-22) that his confession was given under circumstances that rendered it involuntary and that he had been denied the right to counsel. He further argued (App. Br. 5-15) that the reception in evidence of Peele's confession deprived him of his rights under the Confrontation Clause and was contrary to *Bruton*.

The Court of Criminal Appeals reversed (Pet. App. A1-A12). The court initially held that the totality of the circumstances surrounding the making of respondent's confession demonstrated that it was voluntarily given and that respondent had validly waived his right to coun-

[7] In rebuttal argument the prosecution observed that Peele was available to be called as a witness by the defense, as well as the prosecution (J.A. 340). An objection to this argument was overruled (*ibid.*).

sel (*id.* at A4-A6). However, the court held that the introduction of Peele's confession violated respondent's rights under the Confrontation Clause, as construed in *Bruton* (*id.* at A6-A12).

The court acknowledged that the prosecution had employed Peele's statement only in rebuttal and for proper nonhearsay purposes, holding that "the Peele confession as used at trial was not hearsay within traditional rules of evidence" (*id.* at A7). And the appellate court acknowledged that the trial judge had properly instructed the jury "not to consider Peele's statement as proof of [respondent's] guilt * * *" (*id.* at A11). But the court remarked that the State's evidence left "[t]he implication * * * that [Peele's] confession was a true rendition of events on the night of the homicide" (*id.* at A8), and accordingly that "admission of this confession for any purpose constitutes a denial of [respondent's] fundamental right to cross-examine those witnesses against him" (*id.* at A8-A9). The court explained that if Peele had been present, respondent "could have challenged his accusations as well as the authenticity of the confession" (*id.* at A9).

The Court of Criminal Appeals further stated that "no valid state interest [was] served" by the admission of Peele's statement, pointing out that Peele was available to the State and could have been called as a witness. Alternatively, the court held that an effort should have been made to "limit prejudice to [respondent] by redacting incriminating portions of [Peele's] confession." Pet. App. A9. The court asserted (*ibid*):

> From an examination of the confession, this could have been done without detracting from the alleged purpose for which the confession was introduced.

The Court of Criminal Appeals also declined to apply the interlocking confessions doctrine set forth in *Parker* v. *Randolph*, 442 U.S. 62 (1979) (plurality opinion), on the ground that the doctrine should be confined to joint trials where judicial economy considerations may

justify reliance on limiting instructions to prevent prejudice to a defendant who has himself confessed. Alternatively the Court of Criminal Appeals thought the interlocking confessions doctrine inapplicable because "Peele's confession made [respondent] much more a principal actor in the burglary and hanging than the defendant's September 17th confession did" (*id.* at A11). Finally, the Court of Criminal Appeals concluded that the probative value of Peele's statement (if considered for its truth) was so great here as to preclude a finding of harmless error (*id.* at A11-A12).

SUMMARY OF ARGUMENT

A. In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court prohibited the admission in evidence at a joint criminal trial of a confession by a nontestifying codefendant that incriminates another defendant, but is inadmissible hearsay as to him, because of the risk that a jury will disregard or be unable to follow the limiting instructions given to it, and the devastating impact that would often result to a defendant's case if that risk were realized. In *Parker* v. *Randolph*, 442 U.S. 62 (1979), a plurality of the Court concluded that the risk of devastating unfair prejudice that occasions the *Bruton* rule does not exist at a joint trial where interlocking confessions of both defendants are admitted; Justice Blackmun wrote separately stating that where all defendants have confessed, any *Bruton* error is ordinarily to be regarded as harmless. The question presented by this case is whether *Bruton* requires the exclusion of a nontestifying accomplice's confession at the separate criminal trial of a confessing defendant, where the accomplice's confession, while inculpating the defendant, is offered and admitted solely for the nonhearsay purpose of rebutting the defendant's claim that his own confession was made as a result of coercive interrogation in which he was pressured to replicate the accomplice's confession. The decision below was incorrect in holding that such use is prohibited.

B. *Bruton* is addressed only to the situation in which the nontestifying declarant's statement is inadmissible for any purpose against the defendant. 391 U.S. at 128 n.3. On the other hand, this Court's decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970), makes clear that no confrontation question arises when a declarant's extrajudicial statement is received for some purposes for which it is relevant, other than to establish the truth of the averments contained therein. *Id.* at 88 (plurality opinion); *id.* at 98 (Harlan, J., concurring).

This case is governed by that principle. By disavowing his own confession and urging that he was coerced into duplicating Peele's statement, respondent made it essential that the trier of fact be able to assess the truth or falsity of this claim. And there was no better means of enabling the jury to do that than to place Peele's statement before the jury with appropriate limiting instructions. Those instructions, coupled with the prosecution's carefully focused examination of Sheriff Papantoniou and its equally carefully tailored closing argument, directed the jury's attention exclusively to the question whether Peele's statement supported or refuted respondent's claim of coercion.

Moreover, no alternative means were available to the prosecution by which to secure its legitimate objective. Although the court below stated that redaction would have been feasible and effective here, it did not explain how that could have been accomplished without wholly subverting the purpose for which Peele's statement was offered, and our examination of the record suggests to us that redaction was not a viable alternative here. On the other hand, respondent was fully able to achieve any legitimate objective he had. If he wished to examine Peele regarding the substance of his statement inculpating respondent and believed that Peele would be willing to answer, he was fully capable of calling Peele (conveniently located in the county jail) as a witness.

C. The reception in evidence of Peele's statement is also supported by the decision in *Parker* v. *Randolph*, be-

cause, in light of the reception in evidence of respondent's own confession, the risk of failure to follow the trial court's limiting instruction did not portend serious injury to the defense case. Although respondent's trial was not a joint trial, *Parker* v. *Randolph* is not thereby rendered irrelevant, contrary to the view of the court below. The State's interest in preserving the integrity of the fact-finding process, which supports the admission of Peele's statement, plainly is far more compelling than the judicial economy considerations present in the joint trial situation. And it is especially clear here that consideration of the content of Peele's statement (if the jury ignored the limiting instruction) could have had little incremental adverse impact on the defense case, because respondent's own testimony already had made clear—as it had to in order to make out his defense—that Peele's statement thoroughly implicated him. Thus, upon "weighing *all the circumstances* in order to determine whether the defendant in fact was unfairly prejudiced by the admission of" his nontestifying accomplice's statement (*Parker* v. *Randolph*, 442 U.S. at 79 (opinion of Blackmun, J.) (emphasis added)), it is clear that no error was committed by the trial court in receiving Peele's statement.

ARGUMENT

THE RECEPTION IN EVIDENCE OF PEELE'S CONFESSION DID NOT VIOLATE RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE

A. Introduction

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that the admission in evidence, at a joint criminal trial, of a nontestifying defendant's out-of-court confession, which also incriminated his co-defendant but was inadmissible hearsay as to him, denied the co-defendant the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. In *Bruton* the district court had given an accurate limiting instruction stating that the confession of the first defendant,

Evans, was admissible as to him but was inadmissible hearsay as to Bruton (who had not himself confessed), and was not to be considered in determining Bruton's guilt. This Court held that the limiting instruction was, in this context, an insufficient safeguard against the prejudice that could result if the jury were to consider Evans' confession as evidence of Bruton's guilt, without the safeguard against unreliable testimony ordinarily provided by cross-examination. 391 U.S. at 135-136.

As a predicate for its ruling in *Bruton* the Court noted, initially, that "the hearsay statement inculpating [Bruton] was clearly inadmissible against him under traditional rules of evidence * * *" (391 U.S. at 128 n.3) and emphasized that "the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case * * *" (*id.* at 127-128). The Court explained that there are many circumstances in which it is proper to rely on limiting instructions to confine the jury's consideration of evidence to the purposes for which it is admissible (*id.* at 135), but it viewed the problem created by a joint trial in which only one defendant confesses as exceptional, stating (*id.* at 135-136) that such reliance is unwarranted

> where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

The Court concluded that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [the] constitutional right of cross-examination" (*id.* at 137).

The Court's analysis in *Bruton* also laid considerable emphasis upon the availability of alternative procedures to accomplish the legitimate prosecutorial, truth-seeking, and judicial management objectives that were served by the admission of one defendant's confession in a joint trial there. 391 U.S. at 133-134. The Court observed that in some instances redaction of confessions to delete references to defendants other than the author of the confession may be possible. *Id.* at 134 n.10. (This discussion of the possibility of redaction made clear, however, that this approach is not always practicable or effective.) In other cases, the Court explained, a severance is the proper procedure. *Id.* at 131-132, 134-135.

B. Because Peele's Statement Was Admissible For Nonhearsay Purposes Against Respondent, No *Bruton* Error Was Committed By Trial Court

A fair reading of *Bruton* readily discloses that the judgment of the Tennessee Court of Criminal Appeals is ill-founded.

1. We note initially that, unlike Evans' confession in *Bruton*, which, the Court took care to observe, was "clearly inadmissible against [Bruton] under traditional rules of evidence" (391 U.S. at 128 n.3), Peele's statement was admissible against respondent for a proper purpose.[8] Because the prosecution's purpose in placing

[8] The premise of *Bruton* that Evans' statement was inadmissible for any purpose against Bruton, while correct when that case was decided, is not necessarily so under the subsequently adopted Federal Rules of Evidence. If this case were governed by those Rules and Peele had invoked his privilege against self-incrimination, he would have been deemed unavailable to testify. Fed. R. Evid. 804(a). Peele's statement might then have been deemed admissible against respondent for its truth as a declaration against penal interest. See Fed. R. Evid. 804(b)(3); but see advisory committee note accompanying Rule 804(b)(3), 28 U.S.C. App. at page 733 ("[A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."). While the Federal Rules of Evidence abandoned the common law doctrine refusing to recognize a hearsay exception

the statement in evidence was not to prove the truth of Peele's account (either insofar as it incriminated respondent or in other respects), but solely to rebut the claim that respondent had been coerced into replicating Peele's statement, the Court of Criminal Appeals itself acknowledged that "the Peele confession as used at trial was not hearsay within traditional rules of evidence" (Pet. App. A7). Respondent did not argue otherwise in the court below or in his opposition to certiorari in this Court. Moreover, the Tennessee court correctly understood that hearsay has traditionally included only out-of-court statements offered in evidence "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)). See also advisory committee note on Rule 801(c), 28 U.S.C. App., at page 716; *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970) (plurality opinion).[9]

2. The clear admissibility against respondent of Peele's confession for the nonhearsay purpose for which it was offered is of critical importance to the Confrontation Clause issue. For "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered in-

---

for declarations against penal interest, the framers of those rules did not purport to resolve any confrontation issue created by Rule 804(b)(3). See advisory committee note, 28 U.S.C. App. at page 733. This case, in which the unavailability of Peele was not established and his statement was not admitted on a penal interest rationale, does not require the Court to consider whether the declaration against penal interest exception to the hearsay rule overcomes the confrontation problem in a case like *Bruton*.

[9] Whether or not Peele's statement as used at trial was hearsay is, in the first instance, a question of state law. On the other hand, if state doctrine were in this respect significantly idiosyncratic, the nonhearsay classification of the evidence might be of limited importance in the Confrontation Clause analysis. Cf. *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (statement of unavailable hearsay declarant deemed sufficiently reliable to surmount Confrontation Clause objection "without more" in a case "where the evidence falls within a firmly rooted hearsay exception"; otherwise "particularized guarantees of trustworthiness" must be shown).

admissible; quite the contrary is the case." *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 10; see also *id.* at 8-9. Nor is there any reason to believe that the Confrontation Clause requires application of such a "strange rule of law" (*id.* at 10). See *Dutton* v. *Evans*, *supra*; *United States* v. *Astling*, 733 F.2d 1446, 1455 (11th Cir. 1984).

In *Dutton*, this Court upheld against Confrontation Clause challenge Georgia's co-conspirator declaration exception to the hearsay rule, which was broader than the exception recognized in federal law in that it applied to statements made during the "concealment phase" of a conspiracy. At Evans' trial a prison inmate (Shaw) was permitted to recount a statement incriminating Evans that Shaw said his fellow inmate (Williams), who allegedly had been Evans' accomplice, had made to him. Before turning to the question whether the Georgia co-conspirator declaration rule, which made Williams' out-of-court declaration admissible for the truth of its contents, ran afoul of the Confrontation Clause, Justice Stewart, writing for a plurality, observed (400 U.S. at 88; emphasis added; footnote omitted):

> Evans was not deprived of any right of confrontation on the issue of whether Williams actually made the statement related by Shaw. *Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made.* The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. *From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.*

The Court explained (*ibid.*) that the Confrontation Clause issue arose only "because jury was being invited to infer that Williams had implicitly identified Evans as the

perpetrator * * *"—in other words because Williams' declaration was introduced for the purpose of having the jury consider it as a truthful statement evidencing Evans' guilt.[10]

3. This case illustrates the reasonableness of the rule that use of an out-of-court declaration for nonhearsay purposes raises no confrontation question. The State did not seek to introduce Peele's statement as part of its affirmative case. Rather, the prosecution sought to draw the language and exact contents of Peele's confession to the jury's attention as part of its rebuttal case only when respondent had made those facts vitally relevant in a separate connection. By disavowing his confession and claiming specifically that Sheriff Papantoniou had coerced it from him by reading him Peele's statement and demanding that he replicate it, respondent made it entirely appropriate for the State to show the implausibility of that claim.

By what means, then, could the prosecution have rebutted respondent's contention? First, it could and did present the testimony of the sheriff as to what actually occurred during the interrogation of respondent. The sheriff denied that he had read Peele's statement to respondent at all, stating that he had merely shown him Peele's signature on the confession to encourage him to make a statement (J.A. 277). This rebuttal alone would

[10] Justice Stewart's opinion was joined by the Chief Justice and Justices White and Blackmun. Justice Harlan concurred in the judgment, urging that the Confrontation Clause was not intended to regulate the admissibility of evidence, but only to govern procedures relating to testimony by actual trial witnesses, and that a due process analysis should govern the former subject (400 U.S. at 93-100). Justice Harlan plainly did not differ with the plurality's view that use of extrajudicial declarations for nonhearsay purposes raises no constitutional issue. Indeed, he reconciled his due process analysis with *Bruton* and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), stating (400 U.S. at 98; emphasis added): "I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced *as evidence of the guilt of an accused* absent some circumstance indicating authorization or adoption."

have left the jury to resolve a swearing contest. But plainly there was a far more telling means of enabling the jury accurately to assess respondent's claim—to allow it to determine, from the contents of the two statements, whether it was likely or even plausible that respondent's statement was an illegitimately conceived clone of Peele's statement.

This is precisely the procedure employed by the State in this case. But the trial court and prosecution did not simply set the jury at large to consider Peele's statement in whatever manner it wished. As we have noted (pages 6 and 7, *supra*) the court repeatedly instructed the jury that Peele's statement was not to be considered for the truth of its contents.[11] As discussed below (pages 25-28), in the absence of circumstances such as those considered in *Bruton*, suggesting an unjustified and potentially devastating risk of unfair prejudice to a defendant resulting from the possibility that such an instruction will not be honored by the jury, this alone suffices to eliminate any Confrontation Clause problem. Moreover, the State did not simply lay the two confessions before the jury and invite it to make an unguided comparison of them. Instead, the rebuttal examination of Sheriff Papantoniou and the State's closing argument were deftly aimed at highlighting specific features of respondent's statement that belied his account of its provenance (see pages 5-7, *supra*).

The prosecutor singled out seven or eight details concerning the crime scene and the course of the commission of the crime that were accurately recounted in respondent's statement. Initially, the prosecution ascertained that the sheriff had not himself divulged these details to respondent (J.A. 276-277), and then that the sheriff had not read Peele's statement to respondent (J.A. 277). Next, the prosecutor had Peele's statement admitted in evidence in written form as an exhibit and orally through the

[11] Respondent has never suggested—much less did he contemporaneously suggest—that the instructions given were in any respect deficient.

sheriff's testimony. This enabled the jury to assess for itself the overall similarities and differences between the two statements.[12]

In this case there were two kinds of significant differences to be discerned. First, respondent's account of his role in the burglary and murder assigns himself a somewhat more passive role than that assigned him by Peele's statement. From this the jury could have inferred that respondent's claim that he had been browbeaten into replicating Peele's statement was at the least suspect. Second, respondent's statement included numerous factual deta.. of the crime that were nowhere to be found in Peele's statement. This strongly reinforced the sheriff's denial that he had "fed" these details to respondent from Peele's statement and undermined respondent's account of the genesis of his confession. This point was underscored after the conclusion of the sheriff's reading of Peele's statement, when the jury's attention was carefully focused on the absence from Peele's statement of the key details found in respondent's account; the sheriff was asked, item-by-item, whether the particular information appeared in Peele's statement, and a negative answer was returned each time (J.A. 303-304).

It was these unaccounted-for discrepancies that formed the centerpiece of the prosecutor's treatment of Peele's statement in his closing argument designed to discredit respondent's disavowal of his own confession (J.A. 335-

[12] Respondent can hardly argue that this was an impermissible purpose, inasmuch as his own counsel had previously sought (albeit unsuccessfully) to do exactly this, on precisely the same rationale (see page 4, *supra*), evidently expecting that respondent's claim would be aided rather than undercut thereby. To be sure, respondent presumably still expected at the earlier juncture that Peele would be called as a prosecution witness. But his own effort to place Peele's confession before the jury in haec verba nonetheless reflects recognition that it was vitally relevant to an issue in the case quite distinct from the truth value of Peele's statements inculpating respondent. Moreover, respondent's abortive effort also reflects recognition that the purpose to be served by placing Peele's statement before the jury could not be achieved by calling him as a witness.

336). The focus of the prosecutor's argument—and its propriety—could scarcely have been clearer (J.A. 336):

> It would have been utterly impossible if—if this man [Sheriff Papantoniou or Agent Collins] was the greatest dramatic coach in the world and—and Joe Street an actor that—ability to memorize, you couldn't get that many details right and the details aren't the same anyway. Joe Street gave [Agent] Collins in that confession information he didn't have before. Information not in Clifford Peele's statement. The only way he knew that, ladies and gentlemen, was he was there, in the truck, standing there putting the noose around Ben Tester's neck.

4. Given the defense raised by respondent, the argument made by the prosecution and the evidence underlying it plainly were vital to the fair development of the prosecution's case and essential to the truth-seeking function of the criminal trial. To have permitted respondent to testify as he did and to argue as he did while denying the State effective means of rebuttal would have been wholly unwarranted. The Tennessee trial court correctly concluded that *Bruton* does not require any such result.

Indeed, nothing in *Bruton* devalues the search for truth. We have already noted that the result reached in *Bruton* rests explicitly on the fact that the codefendant's statement was inadmissible against Bruton under the rules of evidence. *Bruton* also rests upon the recognition that the "pursuit of truth" in that case through the use of a "confession to prove the confessor's guilt" could be achieved by means other than the introduction of a statement inculpating the confessor's co-defendant in a joint trial (391 U.S. at 133-134). Two "alternative ways" of pursuing the truth were available there. The most important was the granting of a severance. A secondary alternative mentioned was the use of a redacted statement that deleted references inculpating the nonconfessing defendant in a joint trial, provided that course

would prove practical and efficacious. *Id.* at 131-132, 133-135 & n.10. But neither of these alternative vehicles for assuring the integrity of the truth-seeking process was available in this case.

Severance obviously was no alternative to the introduction in evidence of Peele's statement for rebuttal purposes. Respondent's trial had already been severed from those of his co-defendants. It was respondent himself who injected Peele's statement into his own case in a manner that undid the benefits of the severance. The Court of Criminal Appeals did assert, however, that Peele's statement could have been redacted "without detracting from the alleged purpose for which the confession was introduced" (Pet. App. A9). This conclusion seems quite clearly unfounded.

We note initially that the Court of Criminal Appeals did not venture any explanation, much less an illustration, as to how redaction might have been accomplished without either frustrating the purpose for which Peele's statement was introduced or failing to reduce the risk that the jury would disregard the instructions limiting the use it could make of Peele's statement. Obviously, the kind of redaction adverted to in *Bruton*, "deletion of references to [the nonconfessing] codefendant" (391 U.S. at 134 n.10), would make it impossible for the jury to evaluate respondent's claim that his statement was a coerced imitation of Peele's. This approach would not only have frustrated the prosecution's legitimate objective; it could well have prejudiced respondent, creating an artificial difference between his statement and Peele's in the eyes of the jury and making it appear that he alone had indicated that he was a participant in the crime. It was perhaps for this reason that respondent did not argue in the court of appeals that redaction was a viable approach that should have been required and has never explained how the Court of Criminal Appeals' uninformative suggestion could have been carried out.

Nor are we able to conceive of any more subtle method of redaction that would have been both practical and efficacious here. Because the primary thrust of the State's rebuttal argument was that respondent's statement contained significant details absent from Peele's account of the crime, the jury needed to be able to consider all of Peele's statement. Even if Peele's statement were deemed potentially damaging, if considered as evidence of respondent's guilt by the jury, because it assigned respondent a somewhat more prominent role in the planning of the burglary and the actual assault on and hanging of Ben Tester, it would have been a hazardous and misleading enterprise to delete these portions of Peele's statement. Redaction of this sort would have been difficult to accomplish without impermissibly rewriting Peele's statement and confusing the jury; moreover, it would have hampered the jury in a significant respect, for the very differences between the two confessions as to respondent's role would necessarily be a focus of consideration in assessing respondent's claim that he had been forced to copy Peele's statement. Thus it is evident that, because of the nature of the defense claim being rebutted, redaction was not a viable alternative here.[13]

5. As we have noted, the admissibility of Peele's statement for nonhearsay rebuttal purposes, and for those

---

[13] Respondent did not propose redaction in the trial court. Following admission of Peele's statement in written form, but before Sheriff Papantoniou had commenced reading the statement, defense counsel did seek to bar its reading, suggesting that the prosecutor or the witness simply be permitted to point out the disparities between the two statements (J.A. 293). The court determined that the prosecutor had latitude to accept or reject this suggestion (J.A. 293, 295). For the reasons stated in the text, this approach would have given the jury an unduly limited field for examining the competing contentions, and would in all likelihood have actually undercut respondent's claim that his confession was an involuntary imitation of Peele's. At least absent an appropriate stipulation between the parties, it would appear undesirable to keep from the jury the best evidence as to the plausibility of respondent's claim.

purposes only, was repeatedly emphasized to the jury by the trial judge (see pages 6 and 7, *supra*). The independent admissibility of Peele's statement for a proper purpose serves to distinguish this case from *Bruton* in yet another respect, for it lends added credibility in the context of the case to the "crucial assumption underlying [the jury trial] system * * * that juries will follow the instructions given them by the trial judge." *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion). Of course *Bruton* stands for the proposition that this assumption has its limits; but rather than calling in question the general validity of this well-established general rule, *Bruton* reaffirms the rule, announcing only a limited exception thereto. *Bruton*, 391 U.S. at 135-136; *Parker* v. *Randolph*, 442 U.S. at 73-74; see page 12, *supra*. And recent decisions of this Court reaffirm the vitality of the basic assumption in this Court's jurisprudence. *Marshall* v. *Lonberger*, 459 U.S. 422, 438 & n.6 (1983).

Quite apart from the considerations that suggest that relatively little incremental prejudice would have been suffered by respondent if the jury was unable to obey the limiting instructions (see pages 25-28, *infra*), the risk of misuse of the evidence was itself markedly reduced in this case because the evidence was admissible as to respondent for a clearly defined purpose distinct from proving his participation in the crime. Undoubtedly there are circumstances in which it is simply unrealistic to expect a jury to abide by instructions requiring it to put wholly out of mind the inculpatory confession of one defendant in determining the guilt of another defendant at a joint trial, while considering that confession unreservedly in determining the guilt of the confessor. Here, however, in contrast to *Bruton*, the confession was not introduced for its truth at all; the mental discipline expected of a jury in a case such as this, when evidence is admissible as against the sole defendant in a severed trial but for a limited purpose, is a more realistic requirement, and one that the law generally presumes jurors to be capable of carrying out.[14]

Moreover, the record in this case confirms that when evidence admissible for a limited purpose is relevant to a significant discrete issue in a criminal trial, the jury's attention may be effectively focused upon the issue in connection with which the evidence is admissible. As we have explained, in this case this channeling effort did not rest upon the court's legal instructions alone. On the contrary, the entire course of the examination by which Peele's statement was elicited and its salient characteristics drawn in relief, and the prosecution's carefully confined summation addressing that evidence, served as a powerful safeguard against jury error as to the proper use of Peele's statement in this case.

6. Because of the distinctive and limited purpose for which Peele's statement was received in evidence, the practical consequences of discerning a Confrontation Clause violation in the reception of Peele's statement here would be peculiar indeed. The implication of finding a Confrontation Clause violation in this case, of course, is that the prosecution should have called Peele to testify as a witness if it wished to rebut respondent's claim that his confession was coerced. Paradoxically, however, while calling Peele to testify might have added to the prosecution's case in other respects (assuming Peele did not invoke his privilege against self-incrimination (see pages 2-3 note 1, *supra*)), it would have been wholly ineffective to make the point for which Peele's statement was introduced in evidence.[15] Conversely, while respondent

---

[14] See, *e.g.*, *United States* v. *Abel*, slip op. 10; *Jenkins* v. *Anderson*, 447 U.S. 231, 237-238 (1980); *Oregon* v. *Hass*, 420 U.S. 714, 721-722 (1975); *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971); *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967).

[15] In this respect, the situation resembles that in which a prior consistent statement of a witness, though ordinarily inadmissible, is properly used to rebut a claim of recent fabrication. Fed. R. Evid. 801(d)(1)(B). In such circumstances, no amount of trial

might have cross-examined Peele (assuming he testified and adhered to his prior statement) as to inculpatory statements made about respondent, such cross-examination would be wholly ineffective to undercut the prosecution's use of Peele's confession to rebut respondent's disavowal of his own confession.

As a consequence it is scarcely evident that respondent would have been better off if the prosecution had called Peele as a witness in its affirmative case. In the circumstances, instead of forcing the prosecution's hand by requiring it to call a witness who could be cross-examined only as to matters distinct from those for which the State wished to employ his statement, it was sensible to leave to respondent the choice as to whether to call Peele, the declarant, as a witness in court. See *Dutton* v. *Evans*, 400 U.S. at 88 n.19 (plurality opinion). We note that Peele was equally available to the prosecution and the defense in this case. All counsel were aware that he had been brought to the Unicoi County Jail so that he would be available to testify if called. Thus this is not a case like *Barber* v. *Page*, 390 U.S. 719 (1968), or *Ohio* v. *Roberts*, 448 U.S. 56 (1980), where the prosecution, because of its superior resources, or governmental authority, has significantly greater ability than the defense to locate an out-of-court declarant and thereby make live testimony and confrontation possible. Here, respondent was practically and legally free to call Peele as a witness, and presumably free to cross-examine him if he proved a hostile one. Cf. *Ohio* v. *Roberts*, 448 U.S. at 70-73. It is difficult to discern how respondent was injured by requiring him to decide whether, given the prosecution's election not to call Peele as a witness to testify on matters pertaining to respondent's guilt or innocence, he should bring Peele's testimony before the jury in that connection.

---

testimony by the witness can substitute for evidence of the out-of-court statement.

C. Because The Impact Of Peele's Statement, Even If Considered As Evidence Of Respondent's Guilt, Was Limited, The Reception Of That Statement With An Appropriate Limiting Instruction Was Not Error

In *Parker* v. *Randolph*, the Court upheld the convictions of defendants rendered after a joint trial in which none of the defendants testified and the out-of-court confession of each was admitted in evidence with a limiting instruction permitting it to be used as evidence only against the defendant who gave it. Justice Rehnquist, joined by the Chief Justice and Justices Stewart and White, concluded that, given that each defendant had himself confessed, the impact on each one's defense of the possibility that the jury disregarded its limiting instructions, even if realized, was insufficiently great to warrant separate trials or exclusions of the confessions. 442 U.S. at 69-76. Justice Blackmun concurred in the judgment (*id.* at 77-81) on the ground that any *Bruton* error was harmless beyond a reasonable doubt, observing that in "most interlocking-confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt" (*id.* at 79), while refusing to "adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession" (*ibid.*).[16]

The Court of Criminal Appeals declined to apply the analysis of the *Parker* v. *Randolph* plurality on the ground that the "interlocking confessions doctrine" had no application to the separate trial of a single defendant (Pet. App. A10) and that Peele's statement attributed to respondent a sufficiently enhanced role in the hanging to render the confessions noninterlocking for *Bruton* purposes (Pet. App. A11). These comments reflect a serious misunderstanding of the proper analysis in a case such as this.

---

[16] Justice Powell did not participate. Justices Stevens, Brennan, and Marshall dissented.

1. To be sure, the judicial (and prosecutorial) economy rationale for joint trials may help to explain why the residual risk of prejudice, however slight, that remains for a *confessing* defendant when a co-defendant's confession is admitted in evidence with an appropriate limiting instruction at a joint trial is to be deemed acceptable, rather than merely harmless error. That factor concededly has no bearing on this case. But, as we have explained in the preceding section of this brief, the Tennessee Court of Criminal Appeals overlooked the fact that there is here a reason much more substantial than mere efficiency—one central to the integrity of the fact-finding process for which courts are constituted—for permitting the admission, for limited purposes, of a nontestifying accomplice's confession: the evidence was necessary for the nonhearsay purpose of determining the truthfulness of respondent's testimony that his confession was involuntary. Thus, contrary to what the court below seemed to believe, the prosecution's interest in being able to introduce the nontestifying accomplice's confession here is far weightier than that in *Parker* v. *Randolph*.

On the other hand, for the reasons stated by Justice Rehnquist in *Parker* v. *Randolph*, the risk of "devastating" impact upon a defendant who does not confess flowing from admission in evidence of an accomplice's confession, which the Court perceived in *Bruton*, is simply absent here. 442 U.S. at 72-73, 74-75. In this context, a properly framed limiting instruction is an adequate safeguard against denial of confrontation rights. *Id.* at 73-74. Even if this were not generally true in the case of interlocking confessions, it is assuredly true where, as here, the purpose for which the accomplice's confession was adduced, and the forceful and effective manner in which the jury's attention was directed to that specialized purpose, greatly reduced the risk that the accomplice's confession would be considered for its truth.

The record of this case plainly demonstrates that the reception of Peele's confession had no serious—much less

devastating—impact upon respondent. Given his account on direct examination of the origins of his confession, the jury was already apprised from respondent's own testimony that Peele had implicated him thoroughly in the murder of Ben Tester. Thus, prior to the first mention of the contents of Peele's statement by a prosecution witness, respondent himself confirmed to the jury, in response to his own counsel's question, that Peele's statement had implicated him (see pages 4-5, *supra*). By the time the prosecution presented Peele's actual statement, the defense had let the cat out of the bag. The only significant incremental impact of reading Peele's statement was thus to enable the jury to assess the claim raised by respondent that his statement was purely derivative of Peele's and was involuntary and untrue.

2. We also believe that the Court of Criminal Appeals erred in holding the interlocking confessions doctrine factually inapplicable. The court substantially exaggerated the differences between respondent's confession and Peele's statement. Although Peele did assign a somewhat more prominent role to respondent in planning the burglary and executing the hanging of Ben Tester, it is doubtful that these differences were material. Without undertaking a detailed examination of the elements of the offenses under Tennessee law, we believe that respondent by his own confession fully incriminated himself on a premeditated murder theory;[17] even if he did not, he undeniably did so as to the alternative felony murder theory. In these circumstances, the Court of Criminal Appeals' conclusion is inconsistent with the plurality's analysis in *Parker* v. *Randolph* (see 442 U.S. at 80 (opinion of Blackmun, J.) (congruence of confessions not a prerequisite for admissibility under plurality's analysis)) and with the better view of the "interlocking

---

[17] The Court of Criminal Appeals appears to have overlooked respondent's additional confession of June 27, 1982 (see page 3, *supra*) in suggesting (Pet. App. A11) that only Peele's statement implicated respondent in placing the rope around Tester's neck.

confessions doctrine." See *Tamilio* v. *Fogg*, 713 F.2d 18, 20-21 (2d Cir. 1983), cert. denied, No. 83-649 (Jan. 9, 1984).

3. There is no need, however, to decide in this case what degree of congruence should generally be required as a predicate for applying an interlocking confessions exception to *Bruton*, or even whether such an exception should generally be recognized. As we have explained in the preceding section of this brief, the prosecution had a compelling justification for placing Peele's statement before the jury in this case, and no alternative means were available for securing that legitimate prosecutorial objective. In determining whether it was constitutional error to receive Peele's statement for the limited purpose for which it was offered, the Court must weigh that justification against the risk of unfair prejudice created, which in the circumstances presented was minimal. In light of the overall balance between prosecutorial need for introducing Peele's statement and the potential for unfair prejudice to respondent, it is plain that respondent was not deprived of any constitutional right protected by the Confrontation Clause.[18]

---

[18] We note that the analysis we propose is not necessarily inconsistent with Justice Blackmun's view that it is desirable to employ a more flexible approach to assessing *Bruton* claims than that attributed to the plurality in *Parker* v. *Randolph*. On the other hand, we do not embrace a harmless error analysis, which in many situations, including this case, would send precisely the wrong message to trial courts—*i.e.*, that the evidence in question should *not* be received. As this case illustrates, there is no reason to limit to appellate courts the mandate to "*weigh*[] *all the circumstances* in order to determine whether the defendant in fact was [or would be] *unfairly* prejudiced by the admission of" a nontestifying accomplice's confession. 442 U.S. at 79 (opinion of Blackmun, J.) (emphasis added). Cf. Fed. R. Evid. 403.

CONCLUSION

The judgment of the Court of Criminal Appeals of Tennessee should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

JANUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10139

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,

Petitioner,

v.

HARVEY J. STREET,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals of Tennessee at Knoxville

BRIEF FOR THE RESPONDENT

STUART HAMPTON
Counsel of Record
(Appointed by this Court)
630 Elk Avenue
Elizabethton, Tennessee 37643
(615) 543-6000

LANCE J. ROGERS
310 Hedge Street
Charlottesville, Virginia 22901

VIVIAN BERGER
435 W. 116th Street
New York, New York 10027
Counsel for Respondent

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Whether the violation of respondent's confrontation rights arising from the introduction of an available, non-testifying accomplice's unredacted confession to the police, which powerfully incriminated respondent, can be excused either because it was ostensibly admitted to rebut respondent's testimony that his own confession was, in part, a coerced "parroting" of the accomplice's or on the ground that the two statements were allegedly "interlocking."

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

CASES: Page

Table of Authorities Continued

Page

Table of Authorities Continued

STATEMENT OF THE CASE

This case involves a (then) seventeen year-old juvenile who was convicted of murder and sentenced to life imprisonment. He was found guilty of having participated in a burglary in which the victim was killed.

On August 27, 1981, the Carter County Sheriff's Office discovered the body of Ben Tester hanging by the neck from a tree in his yard in Hampton, Tennessee. (J.A. 14) His house had been ransacked in an apparent burglary. (J.A. 17) During the investigation of the Tester death, the authorities contacted and questioned Harvey J. ("Joe") Street, a seventeen year-old juvenile, a number of times. (J.A. 188, 269-272)

On September 16, Clifford Peele, an adult, confessed to the burglary and murder. His confession implicated Street as a principal actor in both the burglary and the murder. (J.A. 30-32)

On September 17, 1981, Joe Street signed a confession prepared by Agent Don Collins of the Tennessee Bureau of Investigation (TBI). (J.A. 24, 26-28, 50-58, 64-66) Agent Preston Huckeby of the TBI and Sheriff Papantoniou were present and witnessed the signing of the statement. (J.A. 25) According to the statement (J.A. 353-360), Street and Peele planned to burglarize Tester's house while Tester was away at church. Clifford Peele, Eddie Montgomery, Jeff Causby, and Street went to Tester's house in a stolen truck and ransacked the house. Tester returned unexpectedly but was temporarily subdued by Peele. (J.A. 357)

The statement related that at this point Street ran out of the house and urged Peele several times to flee, but that Peele insisted that they first "string him [Tester] up." Montgomery agreed and threatened to "whip"

Street unless Street helped make a gag for Tester's mouth. Street complied and Peele and Montgomery placed Tester on the truck which Peele backed against a tree. Montgomery attached a rope to a tree limb and Peele placed the looped end of the rope around Tester's neck. Peele and Montgomery lifted Tester off the tailgate and left him hanging.[1] (J.A. 358)

Agent Collins testified that throughout the interrogation, Street was distraught and he cried at times. (J.A. 24) The next day, Street recanted his confession, claiming that he had been subjected to threats alternated with promises of leniency. *State* v. *Street*, 674 S.W.2d 741, 743 (Tenn. Crim. App. 1984).

At trial, Street relied on an alibi defense. In support of this defense, thirteen witnesses testified regarding his whereabouts on the evening of August 27. (J.A. 86-160) Street also testified in support in his alibi defense and repudiated his September 17th confession. He stated that Sheriff Papantoniou had, in addition to threatening and coercing him, forced him to adopt the confession of Clifford Peele. He testified that Sheriff Papantoniou showed him photographs of the deceased and the deceased's residence (J.A. 242, 249), read Peele's confession to him, and instructed him to give a statement which conformed to Peele's. (J.A. 190-94) Street further recounted that he had lied repeatedly in the statement but that whenever

[1] At trial Ray Williams, a carpenter at the Carter County Jail, stated that on or about November 23, 1981, Street told him that he knew where items stolen from Tester's home could be found. (J.A. 86) Bobby Colbaugh, a Judicial Commissioner, testified that he overheard a conversation on June 27, 1982, between Sheriff Papantoniou and Street wherein Street admitted placing the rope around Tester's neck. (J.A. 76) Sheriff Papantoniou corroborated this statement. (J.A. 304-305) Street categorically denied making these two oral statements. (J.A. 204)

he digressed significantly from Peele's version of the crime, the Sheriff would call him a liar and insist that he recite the events consistently with Peele's confession.

The State cross-examined Street extensively and focused upon the particulars given in Street's confession which were absent from Peele's. (J.A. 239-250) Street accounted for these discrepancies by explaining that he had been prompted by the Sheriff to recite certain details, that he related other details after viewing the photographs shown him by the Sheriff, and that he had deliberately lied regarding the rest.

The State then called Sheriff Papantoniou and Agent Huckeby as rebuttal witnesses. The Sheriff stated that, although he had had a copy of Peele's confession and had shown Street Peele's signature on the confession (J.A. 309), he had not forced Street to "parrot" the Peele confession. (J.A. 274-75, 309) The Sheriff's account was corroborated by Agent Huckeby who testified that the Sheriff had not forced Street to imitate Peele's confession.[2] (J.A. 326-27)

In support of his rebuttal testimony, Sheriff Papantoniou also reviewed the two confessions and highlighted the discrepancies between them. Specifically, Street's confession mentioned that: (1) a light was on in Tester's house prior to the burglary; (2) Tester's shirt had been ripped; (3) a nylon rope had been used to hang Tester; (4) a gag had been made from a torn bed sheet; (5) Tester's wallet was located in the front bedroom; (6) money had been taken from Tester's wallet; and (7) shirts had been taken from the residence. Sheriff Papantoniou observed that these details were not to be found in the Peele confession. (J.A. 303-304)

[2] T.B.I. Agent Collins had also testified during the State's case in chief that respondent's confession was not coerced. (J.A. 22-29, 64-66, 74-76)

In addition to the foregoing, the State introduced Peele's statement and allowed Sheriff Papantoniou to read the entire confession to the jury. The defense objected strenuously on the ground that its admission would violate not only the hearsay say, but also Street's right of confrontation. (J.A. 283, 287) The State argued that the confession was admissible because: (1) it was not being offered for the truth of the matter asserted, and therefore did not constitute hearsay; and (2) there was no confrontation violation because Street had "opened the door" to admission of the statement by taking the stand and contesting the validity of his own confession. (J.A. 287-88) The court overruled the objection and instructed the jury to consider Peele's confession only for rebuttal purposes. (J.A. 292-93, 350)

The defense suggested that the damage to Street could be minimized if the Sheriff simply pointed out the differences between the two statements. (J.A. 293) The State agreed and began asking Sheriff Papantoniou about the references in Street's declaration which were absent from Peele's. (J.A. 294) The Sheriff stated that he could not respond without first reading through Peele's confession. The court then permitted him to read the statement but cautioned him: "[R]ead it to yourself, don't read it aloud." (J.A. 294)

The State then reversed its position and informed the court that it intended to have Sheriff Papantoniou read the entire confession to the jury. The court reminded the prosecution of the understanding that the Sheriff was not going to read Peele's whole confession to the jury but, rather, would only highlight the differences between the two statements. (J.A. 294) The State argued that it "would be more coherent" if the Sheriff was allowed to read all of Peele's confession. (J.A. 295) The court permitted the Sheriff to do so over the defense's renewed objection.

The State made no attempt to present Peele as a witness, although Peele was present in the Unicoi County Jail in close proximity to the courthouse. (J.A. 7) Nor was any effort made to redact Peele's confession.

The Tennessee Court of Criminal Appeals reversed the conviction. *State* v. *Street*, 674 S.W.2d 741 (Tenn. Crim. App. 1984). The court noted that although the Peele confession "as used at trial" was not technically considered hearsay in Tennessee, *id.* at 744-45, the admission of the highly incriminating confession of an available accomplice nevertheless violated Street's confrontation rights. The court also held that the confessions were not sufficiently "interlocking" to invoke the interlocking confession doctrine observed under Tennessee law because Peele's confession added significant incriminating matter to Street's confession, such that Street was exposed to a greatly increased risk of conviction. *Id.* at 746. Finally, the court concluded that the error in admitting Peele's confession could not be considered harmless because:

> Peele's statement not only implicated the defendant [Street], it alone established all essential elements of the homicide, had the jury chosen to believe defendant's confessions were in fact involuntary. Defendant is entitled to a new trial free of this constitutional error. *Id.* at 747.

SUMMARY OF ARGUMENT

I. The confrontation clause guarantees an accused the right to cross-examine and otherwise test the veracity of his or her accusers. This constitutional safeguard is more than a mere codification of the local laws of evidence—in particular, the hearsay rule. Generally, to dispense with confrontation of an absent declarant, this Court has required that an incriminating hearsay statement introduced at trial carry adequate indicia of reliabil-

ity and that the speaker be unavailable. Because a confession to the authorities by one who incriminates not only himself but also the defendant is deemed both highly unreliable and extremely prejudicial, the right of confrontation bars its introduction against the defendant where he cannot cross-examine the declarant.

For example, in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the prosecutor read the incriminating confession of the previously convicted accomplice to the jury under the guise of refreshing the recalcitrant witness's memory. In reversing Douglas's conviction, this Court employed a practical approach noting that even though this reading did not technically constitute testimony, a significant danger existed that the jury would consider the accomplice's confession as substantive evidence.

The inevitable prejudice cannot, moreover, be cured through a limiting jury instruction. In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court again employed a pragmatic analysis in holding the introduction at the joint trial of a non-testifying co-defendant's confession inculpating the defendant violated the defendant's confrontation rights. Even though the confession had not technically been admitted against the defendant—indeed, the jury had expressly been instructed not to consider it as evidence of the defendant's guilt—this Court held that the jury could not be presumed capable of following the limiting instructions in this situation.

In the instant case, the powerfully incriminating confession of Peele, which placed Street at the scene of the crime and assigned him an active role in the murder of Ben Tester, was technically offered only to refute Street's claim that Sheriff Papantoniou had coerced him into imitating Peele's statement. But under *Douglas*, the legal characterization of the purpose underlying introduc-

tion of this type of evidence does not remove confrontation objections, and under *Bruton* the trial court's limiting instructions could not be trusted to keep the jury from using Peele's statement for its truth. The danger of such "spillover" is particularly great where, as here, the impeachment evidence substantively corroborates the State's theory of the case.

The gravity of the confrontation violation was compounded by the fact that it was gratuitous. The State made no effort to call Peele as a witness, although he was housed in a nearby jail. Moreover, there was no effort to redact the significantly incriminating portions from the confession.[3] Nor did the State merely have Sheriff Papantoniou simply highlight the differences between the two statements. Furthermore, Street's version of the circumstances underlying his confession had been directly contradicted by witnesses testifying for the State both in its case in chief and on rebuttal.

II. Contrary to the State's suggestion, Street did not, by taking the stand and repudiating his confession, "open the door" to admission of his alleged accomplice's confession, so as to forfeit his own confrontation rights. *Harris* v. *New York*, 401 U.S. 222 (1971), *Oregon* v. *Hass*, 420 U.S. 714 (1975), and similar decisions cited by the State are aimed—like confrontation itself—at enhancing the integrity of the fact-finding process. In this case, however, the serious challenge to the truth-finding function of criminal trials originated not from Street's testimony but rather from the introduction of the "inevitably suspect" confession of an absent accomplice which implicated Street. *Bruton*, 391 U.S. at 123. The decisions of this Court have never gone so far as to sanction impeach-

[3] As noted by the Tennessee Court of Criminal Appeals, redaction could have been accomplished without detracting from the confession's purported rebuttal purpose. 674 S.W.2d at 745.

ment through evidence as inherently untrustworthy as an accomplice's extra-judicial confession to police. Such a statement is not only inherently unreliable, but it is also immune from traditional adversarial testing.

Furthermore, unlike the situation in cases permitting impeachment by a defendant's own prior inconsistent statements or conduct, tangible evidence, or other declarations containing some guarantee of veracity, the gratuitous introduction of the damning confession of Clifford Peele did not unveil perjury. The existence of some discrepancies between the two confessions simply suggested that they were not perfectly identical: a conclusion not inconsistent with Street's assertions that, in addition to being provided with certain details of the crime by the Sheriff, he also deliberately concocted other portions of his own statement.

III. Years before *Parker* v. *Randolph*, 442 U.S. 62 (1970), in which a plurality of this Court posited, but did not define, an "interlocking confession" exception to the *Bruton* rule, Tennessee had adopted its own version of this doctrine as a matter of state law. Hence, the conclusion of the court below—premised entirely on Tennessee law—that the statements of Peele and Street did not interlock, constitutes an adequate and independent state ground insulating this holding from review.

For the many reasons given by Justices Blackmun, Stevens, Brennan, and Marshall in their opinions in the *Parker* case, it would be imprudent for the Court to adopt an interlocking confession doctrine since such a course would undermine defendants' constitutional rights without producing any corresponding benefit. Indeed, the proposed doctrine would only create the additional risk of promoting confusion and inefficient administration in this area of law.

Moreover, the case for such an exception to *Bruton* is especially weak in the present context. An "interlock" exception clearly is unjustified outside the joint trial situation, where, as the court below observed, the "policy arguments favoring judicial economy and efficiency allow admission against the confessor." 674 S.W.2d at 746. Further, the exception is not only unwarranted but also beyond the contemplation of the *Parker* plurality where a defendant takes the stand, presents a defense and repudiates his confession, thus rendering the accomplice's inculpatory extrajudicial confession as "devastating" and inherently "suspect" as it was in *Bruton*.

Finally, introduction of Peele's confession was not harmless error. Nor did it "interlock" with Street's under any reasonable version of that test. The full statement increased Street's risk of conviction of first degree murder substantially by portraying Street as a much more active and willing participant in the killing than Street's own admissions had. Peele's statement alone established all the requisite elements of the crime had the jury believed that Street's statements were not voluntary. Analysis of this Court's decisions which have found *Bruton* errors harmless reveals that the Court has required significant corroboration of the defendant's participation in the enterprise, or other overwhelming proof of the defendant's guilt, independent of the tainted evidence, such that it appears beyond a reasonable doubt that the constitutional violation had no effect on the jury's decision. The Tennessee Court of Criminal Appeals correctly held that this type of overwhelming evidence was lacking in the instant case.

ARGUMENT

THE STATE VIOLATED RESPONDENT'S RIGHT TO CONFRONTATION WHEN IT INTRODUCED THE ENTIRE TEXT OF AN ALLEGED ACCOMPLICE'S CONFESSION TO LAW ENFORCEMENT AUTHORITIES THAT POWERFULLY INCRIMINATED RESPONDENT, WITHOUT PRODUCING THE DECLARANT WHO WAS JAILED NEARBY; THIS VIOLATION CANNOT BE EXCUSED BY THE FACT THAT THE CONFESSION WAS PURPORTEDLY ADMITTED TO "REBUT" RESPONDENT'S ACCOUNT OF THE EVENTS SURROUNDING THE TAKING OF HIS OWN STATEMENT.

1. The Admission Of The Entire Text Of A Confession That Powerfully Incriminated Respondent, Made To Law Enforcement Officials By An Alleged Accomplice Who Was Not Produced At Respondent's Trial, Although He Was Housed In A Nearby Jail, Violated Respondent's Constitutional Right To Confrontation.

The Tennessee Court of Criminal Appeals held correctly that the admission of Peele's unredacted confession violated Joe Street's confrontation rights. This extrajudicial confession plainly devastated Street's case because it placed him at the scene of the crime, thus directly contradicting his alibi defense. Furthermore, even if the jury accepted Street's confession as voluntary and reliable, Peele's statement damaged Street by portraying him as a more willing and active participant in the murder than his own statements did.

Although Peele's confession was purportedly admitted not for the truth of the matter asserted therein, but merely to rebut Street's claim that he had been coerced into parroting Peele's confession, it provided the State with the strongest evidence corroborative of the prosecution's theory of the case.[4] Nevertheless, the trial court's

[4] No physical evidence was discovered linking Street to the crime. (J.A. 33)

ruling foreclosed Street from testing Peele's recollection, demeanor, perception, and—most importantly—veracity through cross-examination because the State never produced Peele as a witness.

This inability to cross-examine wholly undercuts the primary objective of the right of confrontation:

> [T]o prevent depositions of ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination.

Mattox v. *United States*, 156 U.S. 237, 242 (1895). The clause affords a defendant the opportunity to face his or her accusers and subject them to cross-examination. It also permits the judge and jury to view the witness's demeanor as an aid to determining the reliability of the testimony. As noted by the *Mattox* Court:

> [T]he accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

Although the confrontation clause and the rules against admission of hearsay by and large protect analogous values, the right of confrontation is more than a simple codification of the laws of evidence. *California* v. *Green*, 399 U.S. 149, 155 (1970); *Barber* v. *Page*, 390 U.S. 719, 721 (1968); *State* v. *Jones*, 598 S.W.2d 209, 222 (Tenn. 1980). Although an extrajudicial statement may be admissible pursuant to a local rule of evidence, its use at trial may nevertheless deprive a defendant of his constitutional right to confrontation. *Id.*

Generally, to dispense with confrontation at trial, this Court has required that hearsay evidence introduced in the absence of the declarant bear adequate "indicia of reliability." *See, e.g., Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). Ordinarily, too, the prosecution must show that the speaker is "unavailable" as a witness, at least unless the trustworthiness of the evidence appears unusually great. *Id.* at 65-66; *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972); *cf. Dutton* v. *Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result) (discussing such exceptions to the hearsay rule as business records, "where production would be unduly inconvenient and of small utility to a defendant"). In some recurring instances, however, hard-and-fast rules have developed for determining the constitutionality of admitting such "second-hand" proof at trial. With respect to the facts of this case, *Bruton* v. *United States*, 391 U.S. 123 (1968), provides a governing rule of exclusion—one that the State clearly violated here.[5]

In *Bruton*, the Court held that the extrajudicial confession of a non-testifying co-defendant, Evans, implicating the defendant, Bruton, was inadmissible at their joint trial notwithstanding an instruction to the jury that they should consider the confession only against its maker. The opinion rested on two grounds, both equally applicable to Street.

First, the Court deemed an alleged accomplice's confession inculpating a defendant to be both prejudicial and untrustworthy.

> Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect,

[5] The only purportedly "blanket" exception to the *Bruton* rule, the "interlocking confession" doctrine, which the State claims applies to this case, is discussed *infra* at pp. 34-42.

> a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

391 U.S. at 136.

Second, the Court held that a limiting jury instruction, ordinarily assumed sufficiently protective of the rights of litigants (*see, e.g., Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983)), is an inadequate substitute for cross-examination of the confessing accomplice where the accomplice's incriminating statements are spread before the jury, fairly inviting the jurors to draw improper inferences from the evidence. This situation poses dangers of juror disobedience and resulting harm of a wholly different order than those threatened in the usual case:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instruction is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored [citations omitted]. Such a context is presented here, where the powerfully incriminating extrajudicial confession of a codefendant, who stands accused side-by-side with the defendant are deliberately spread before the jury in a joint trial.

391 U.S. at 135-36.

Here, of course, the jury heard the whole "powerfully incriminating" statement of the absent Peele, and the court's instruction to consider it only for "rebutable [sic] purposes"[6] (J.A. 350) could no more serve to protect

[6] Notably, the instructions given by the trial court were highly streamlined. They were also unilluminating since the judge never explained what he meant by "the purpose of rebuttal." *See, e.g.*, J.A.

Street from its unavoidable use on the substantive issue of guilt than could the limiting charge in *Bruton*. There is, moreover, no relevant distinction between the instant situation and *Bruton* that would allow for a different result in the two cases.

Most critically, contrary to the State's position, the purported non-hearsay use of Peele's incriminating statement did not obviate respondent's sixth amendment objection. *Cf.* Brief for Petitioner at 16-18. The Tennessee Court of Criminal Appeals correctly noted: "[D]efendant's confrontation rights are not foreclosed merely because the confession as admitted did not constitute hearsay." 674 S.W.2d at 745. In the area of confrontation, as in other contexts, this Court has pierced the technical labels and concerned itself with the practical effect of the use of certain extrajudicial statements. For example, in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), as in the instant case, the defendant and his accomplice, Loyd, were tried separately. The State called Loyd to testify at the defendant's trial, but he invoked his privilege against self-incrimination when he was questioned about the incident. The prosecution then, under the pretense of "refreshing" the recalcitrant Loyd's memory, read the confession to the jury and also called various law enforcement officers to the stand who testified that Loyd had authored the confession. Not surprisingly, this Court reversed, holding that although the reading of the confession and witness's refusal to answer did not technically constitute testimony, it might "well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement." *Id.* at 419. Furthermore, Loyd's reliance upon the privilege created the additional danger that the jurors would infer that the statement was true. *Id.*

In the instant case, as in *Douglas*, the circumvention of confrontation was sought to be justified by the fiction that the prosecution was not offering the statement for the truth of the matter asserted. Here too, however, the legal rubric of the non-testifying accomplice's confession ("rebuttal" or "impeachment") did not dispel the prejudice arising from its likely use in fact: to convince the jury of Street's guilt.

Nor did the fact that Street and Peele, unlike Bruton and Evans, were not being tried jointly, excuse the State from its obligation either to produce Peele or forego introducing his confession. Indeed, since an accused on trial such as Evans can never be called by the prosecution, this case presents an even stronger argument than did *Bruton* for disallowing the statement's use.

Moreover, even if one assumes—erroneously—that a straightforward application of *Bruton* does not automat-

---

at 292; *see also* J.A. at 293, 350. Although the defense did not object to the instructions below and therefore does not urge their defects as an independent error, their inadequacy only underscores the prejudice resulting from the *Bruton* violation.

Moreover, there is no reason to credit the State's suggestion that the type of limiting instructions involved in this case would have posed *fewer* problems for the jury than those in *Bruton*. Brief for Petitioner at 11; *see also Amicus Curiae* Brief for the United States at 22-23. In fact, the *Bruton* Court suggested in its discussion of *Jackson* v. *Denno*, 378 U.S. 368 (1964), that in so far as one can make generic distinctions, charges requiring jurors to consider proof for one purpose but not another (the situation presented both here and in *Bruton*) call for greater "mental gymnastic[s]" that instructions (such as the one in *Jackson*) which enjoin jurors wholly to ignore a piece of evidence under certain circumstances. *Bruton* v. *United States*, 391 U.S. at 130-31, quoting *People* v. *Aranda*, 63 Cal. 2d 518, 528-29, 47 Cal. Rptr. 353, 407 P.2d 265 (1965). *See generally Jackson* v. *Denno*, 378 U.S. 368 (1964) (under then existing New York procedure, which violated due process, a jury could not be presumed capable of following an instruction to disregard a defendant's confession that they found had been given involuntarily).

ically resolve the matter in Street's favor, general principles of confrontation law clearly do. First, the State did not demonstrate that Clifford Peele was unavailable. Indeed, although Clifford Peele had been transfered to the Unicoi County Jail—in close proximity to the courthouse—during the trial, the State made no attempt to call him as a witness.[7]

Furthermore, Peele's confession bore no indicia of reliability. To the contrary, it was "inevitably suspect," *Bruton*, 391 U.S. at 136, as the statement of an in-custody alleged accomplice.[8]

The gravity of the confrontation violation is compounded by the fact that it was gratuitous. The State made no attempt to secure Peele as a witness. Furthermore, the

---

[7] In its *amicus curiae* brief in support of the State, the United States, in a grossly improper excursion beyond the record seeks to justify Peele's absence by reporting that Peele has agreed to testify against Street but that the State declined at the last minute to call Peele as a witness because he "appeared unreliable." *Amicus Curiae* Brief of the United States at 3, n.1. This reference to "facts" outside the record is not only inappropriate and unprofessional (*see* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 13.11, at 716.17 (5th ed. 1978), and authorities cited; *see also* Supreme Court Rule 34.6), but constitutes an improper effort to justify Peele's absence by suggesting he was somehow "unavailable," and that any good faith effort to produce him as a witness would have proven futile. This "justification" finds no support in the Court's precedents. As observed in *Barber* v. *Page*, the prosecution may not simply assume that a witness is "unavailable." Rather, in order for the "unavailability" standard to be met, the prosecutorial authorities must have first made a "good faith effort" to secure the witness' presence. 390 U.S. at 725.

[8] Peele made at least two confessions—one on September 16 and one on September 11, 1981—which varied in the number of parties implicated. (J.A. 32) The September 16 statement was the one read to the jury.

State had handily accomplished its "rebuttal" through vigorous cross-examination of Street and through the direct testimony of Sheriff Papantoniou and Agent Huckeby, who both testified that Street had not been forced to parrot Peele's confession. (J.A. 274-81, 326-28) Indeed, the Sheriff had specifically highlighted the seven discrepancies between the two statements which the State considered to have crucial impeachment value. (J.A. 303-304)

Plainly, reading the entire text of Peele's confession to the jury added little to the impeachment of Street. The discrepancies in the two statements had been amply demonstrated to the jury. Moreover, the fact that the statements lacked complete identity because they varied regarding such details as whether a light was on or whether the deceased's shirt was torn is certainly not dispositive of the parroting issue.[9] A practical examination of the circumstances reveals that the true impeachment value of Peele's confession did not lie in "revealing" these distinctions. Rather the true impeachment value derived from the fact that it rebutted Street's alibi defense by placing him at the scene of the crime and portraying him as a principal actor in the murder.

In sum, this Court's longstanding pronouncements in *Bruton* and *Douglas* plainly barred the admission at trial of the "inevitably suspect" and damning confession of Peele. Neither a limiting instruction nor the purported rationale of "rebuttal" could disguise or obviate the prejudice to Street from the clear violation of his right to confront the witnesses against him.

---

[9] Indeed, there are some minutiae contained in Peele's confession that also exist in Street's statement which suggest the contrary proposition: that's the second confession *was* an imitation of the first. For example both declarations specifically volunteer that the deceased's tongue was "not sticking out." (J.A. 302, 358)

II. Respondent Did Not Forfeit His Confrontation Rights By Taking The Stand And Repudiating His Confession.

The State argues that by taking the stand and disputing the voluntariness and reliability of his own confession, respondent Street "opened the door" to the introduction of the confession of his alleged accomplice, Clifford Peele. Brief for Petitioner at 18. The admission, however, of a non-testifying accomplice's confession which powerfully implicated the defendant is precisely the type of practice this Court expressly condemned in *Bruton* and *Douglas*.

The State reaches the remarkable conclusion that Street invited this gross violation of his rights by reasoning that: (1) Street's testimony threatened serious perversion of the truth-seeking function of the criminal trial and (2) his narrative could "only" be disproved by introduction of Peele's confession. Brief for Petitioner at 18-19. Not surprisingly, since both of the State's premises are flawed, its conclusion is equally wrong. In fact, the true threat to the "reliability of the result of the trial" (Brief for Petitioner at 18) derived not from Street's testimony but rather from the use of the "inevitably suspect" in-custody statement of an accomplice who could neither be viewed by the jury nor cross-examined by the defendant. *Bruton* v. *United States*, 391 U.S. 123, 136 (1968). Furthermore, Street's veracity could be, and was, tested by much more reliable—and legitimate—means that Peele's confession, the innate unreliability of which was "intolerably compounded" by the declarant's unaccounted-for absence. *Id.*

The State notes that the ultimate goal of a criminal trial is to ascertain the truth; with that observation, respondent heartily agrees. Yet the critical question is not whether, but how, to achieve that goal in the circumstances presented. The State initially concedes, then

mysteriously proceeds to ignore, the crucial point that confrontation itself advances the aim of reliably assessing guilt or innocence at trial. Brief for Petitioner at 19, quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) and *California* v. *Green*, 399 U.S. 149, 161 (1970). The constitutional right to confront adverse witnesses is a truth-*enhancing* process, which reflects the founders' preference for allowing the finder of fact to gauge the veracity of a defendant's accuser at first hand. As this Court has previouly stated, confrontation

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. *Green*, 399 U.S. at 158.

The assertion that the quest for truth will be assisted by dispensing with the right of confrontation, an inherently truth-enhancing protection, thus defies logic. Predictably, it also defies the precedents of this Court.

The authority relied on by the State[10] stands for the proposition that an accused ordinarily may not take the witness stand and turn a constitutional "shield" into a "sword," or license to commit perjury, confident that he cannot be contradicted. As the State necessarily acknowledges, however, nothing in the Court's pronouncements supports the notion that a testifying defendant, by virtue

---

[10] *E.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971). Brief for Petitioner at 19-20.

of waiving his privilege against compulsory self-incrimination, also broadly "waives" the right to confront his accusers. Brief for Petitioner at 19. Indeed, some constitutional protections, such as the ban on coerced statements, serve policies so overriding that no use can be made of evidence obtained in violation of the right. *See New Jersey* v. *Portash*, 440 U.S. 450 (1979) (grand jury testimony compelled by grant of immunity); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (classically involuntary statement by wounded and ill suspect).

But even apart from such blanket exclusions, this Court has consistently limited the operation of the "sword-shield" doctrine to situations where "the trustworthiness of the evidence satisfies legal standards." *Oregon* v. *Hass*, 420 U.S. at 722; *Harris* v. *New York*, 401 U.S. at 224. Peele's confession was, by contrast, the paradigm of an untrustworthy statement.[11] *See generally Bruton* v. *United States*, 391 U.S. at 136. Moreover, none of the cases cited by the State, or their progeny, has ever permitted impeachment by evidence procured in violation of a constitutional safeguard that, like confrontation, by its very nature, directly promotes the reliability of the guilt-or-innocence-determining process. *See Roberts* v.

[11] In the digression beyond the record (*see supra* at p. 17 n.7) wherein the Solicitor General reports that Peele was not called as a witness because the State thought him unreliable, *Amicus Curiae* Brief for the United States at 3 n.1, the Solicitor General fails to clarify the record further by proffering any explanation how Peele's confession could be more reliable than Peele himself. Indeed, since Peele's statement was anything but spontaneous and "may well [have been] motivated by a desire to curry favor with the authorities," (*id.* at 13a n.8, citing Advisory Committee Note to Fed. R. Evid. 804(b)(3)), this omission is scarcely surprising. *Cf. Dutton* v. *Evans*, 400 U.S. at 88 (statement was highly reliable since it has made spontaneously by a declarant who had no motive to lie).

Russell, 392 U.S. 293, 295 (1968) (*Bruton* error results in a "serious flaw" in the fact-finding process at trial).

For example, such cases as *Harris* and *Hass*, which involved statements obtained in violation of *Miranda*, and *Walder* v. *United States*, 347 U.S. 62 (1954), which concerned physical evidence seized in violation of the fourth amendment,[12] dealt—unlike the instant case—with prophylactic exclusionary rules. *See Michigan* v. *Tucker*, 417 U.S. 433, 445 (1974); *New York* v. *Quarles*, ___ U.S. ___, 104 S. Ct. 2626 (1984) (O'Connor, J., concurring). The "shields" provided by the doctrines of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Mapp* v. *Ohio*, 364 U.S. 643 (1961), notably do not enhance, and in fact are frequently hostile to, the quest for truth. Furthermore, since these protections have been laid down primarily to deter official misconduct, they ordinarily achieve their purpose once the evidence has been excluded from the prosecution's case in chief. *Oregon* v. *Hass*, 420 U.S. at 721; *Harris* v. *New York*, 401 U.S. at 225. Here, however, exclusion of Peele's confession solely from the prosecution's direct case could not satisfy completely the underlying policies of the confrontation clause because the rationale for barring such statements rest not on extraneous factors like police deterrence but rather on the central concern of the trial process: the reliable assessment of guilt or innocence.

[12] *Harris* and *Hass* permitted a testifying defendant to be impeached with his prior inconsistent statements obtained in the absence of compliance with *Miranda*. Similarly, the Court in *Walder* held that illegally seized narcotics, though not admissible in the State's initial case, could be used to impeach a defendant who perjuriously claimed that he had never before sold drugs. *See also United States* v. *Havens*, 446 U.S. 620 (1980) (the prosecution could properly cross-examine a witness regarding illegally seized evidence of a T-shirt, altered to facilitate drug smuggling).

Cases like *Harris* and *Hass*, in addition, involved impeachment by a defendant's *own* inconsistent statements. Not only did the internal inconsistency afford the strongest possible proof that the accused had lied, either on the stand or prior to trial, but also—having himself made the previous voluntary utterances—he alone was responsible, and hence in a poor position to complain, if they were in fact untrustworthy. *See also United States* v. *Kahan*, 415 U.S. 241 (1974); *cf. Fletcher* v. *Weir*, 455 U.S. 603 (1982) (the defendant's post-arrest silence was, in the absence of *Miranda* warnings, admissible to impeach his self-defense testimony); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980) (same, as to pre-arrest silence).

Simply put, under the pretext of advancing the search for truth, the state unconvincingly seeks to justify the introduction of a shoddy, inherently suspect document, whose author's credibility was never tested at trial, or indeed in any forum. *Cf. California* v. *Green*, 399 U.S. 149, 166 (1970) (credibility tested at prior preliminary hearing); *Mancusi* v. *Stubbs*, 408 U.S. 204 (1982) (veracity examined at prior trial). Equally unpersuasively, the state defends the reception of the absent Peele's entire statement by arguing that only this course of action could have disproved Street's account of the circumstance surrounding the making of his own confession. The record, however, undeniably refutes that contention.

First, the prosecution assailed the credibility of Street's claim through the testimony of Agent Collins, given during the case in chief. (J.A. 22-29, 64-66, 74-76) Second, Street's assertions were directly contradicted by Sheriff Papantoniou, who testified on rebuttal that he had not forced Street to parrot the alleged accomplice's confession. (J.A. 274-281) Third, Agent Huckeby corroborated the Sherrif's version of what had occurred. (J.A.

326-28) Thus, the State was hardly faced with a situation where the accused could testify without "risk of confrontation" by adverse facts. *Cf. Harris* v. *New York*, 401 U.S. at 226. To the contrary, as previously demonstrated, it was the State that had the improper opportunity to smuggle in a powerfully damaging account of the events underlying the indictment—without subjecting the unreliable author of that tale to confrontation.

It is, of course, understandable that the State preferred to introduce Peele's confession through a sheriff instead of an accused felon. No doubt Sheriff Papantoniou was a better and more credible witness than Peele. Nevertheless, the confrontation clause does not sanction such use of *ex parte* statements in lieu of direct testimony simply because this mode of proceeding proves convenient.

The State seeks to excuse its failure to call the declarant on the ground that "cross-examination of Peele would have shed no light on the issue raised by respondent" regarding the making of the latter's confession. Brief for Petitioner at 18. This argument is wholly beside the point. The *illegitimate* prejudice to Street posed by admitting Peele's confession arose not from its claimed tendency to contradict the "parroting" account but rather from its inevitable substantive "spillover" effect, which could not be cured by any limiting instructions. In other words, the injury to Street derived from Peele's version of the crime itself, starkly laid before the jury without possibility of confrontation. *See generally Bruton* v. *United States*, 391 U.S. 123 (1968).

To be sure, Street's prosecutors were not obliged to call Peele if, for whatever reason, they did not wish to do so. But unless they chose to put Peele on the witness stand in person, *Bruton* and *Douglas* barred them from introduc-

ing his confession accusing Street. The fact that they could not "have their cake and eat it too" provides them with no justifiable basis for complaint. The choice they confronted was, after all, constitutionally imposed.

The United States suggests that Street should have called Peele to examine him about his inculpating statement. *Amicus Curiae* Brief of the United States at 23-24. This approach is wide of the mark. First it presupposes an extraordinary shift to the accused of the State's obligations under the confrontation clause. *See, e.g., Barber* v. *Page*, 390 U.S. 719, 725 (1968) (prosecution must make good faith effort to secure declarant's presence). Indeed, it is reminiscent of a time when prosecutors would confront defendants with incriminating hearsay declarations, usually in the form of "depositions, confessions of accomplices, letters and the like," and then challenge the accused to prove that the statements were false. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883) (emphasis added).

Further, the Solicitor General's suggestion is utterly disingenuous in light of his own extra-record representation that the State expected Peele, if subpoenaed, to assert his privilege against compelled self-incrimination. *Amicus Curiae* Brief for the United States at 3 n.1. No reason exists to believe that Peele's testimony would have been any more "available," as a practical matter, to Street than to the State. *Cf. Dutton* v. *Evans*, 400 U.S. at 88 n.19. However, to the extent the issue of Peele's unwillingness to take the stand remained in doubt, the State could not excuse its failure to produce the witness by assuming, rather than ascertaining, that he would claim the protection of the privilege. *Barber* v. *Page*, 390 U.S. 719, 724-25 (1968); *United States* v. *Inadi*, 36 Crim. L. Rep. (BNA) 2158 (3d Cir. November 13, 1984). *Cf. Parker* v. *Randolph*, 442 U.S. 62, 87 (Stevens, J., dissenting) (in most cases, the prosecution would be hard pressed to make a showing of legal unavailability in light of its ability to grant the accomplice-declarant immunity). In any event, even the proven unavailability of Peele as a witness would not have permitted the State to introduce his confession since the mandate of *Bruton* applies notwithstanding the fact that the State can never call the confessing co-defendant to the stand. *Cf. Nelson* v. *O'Neil*, 402 U.S. 622 (1971) (*Bruton* poses no problem when the confessing co-defendant chooses to testify at the joint trial).

At the very least, the State could have minimized the damage to Street by foregoing the use of the entire confession. As the Tennessee Court of Criminal Appeals expressly noted, redaction would have sufficed to permit the State to show, if it could, that Peele's confession differed in relevant ways from Street's and therefore, arguably, supported its contention that Street could not merely have "parroted" the words of Peele.[13] Redaction, of course, is not always an effective method of preserving a defendant's confrontation rights because a juror can usually deduce at a joint trial that "blank" or "Mr. X" refers to the declarant's codefendant. *See Jones* v. *United States*, 342 F.2d 863, 866-67 (D.C. Cir. 1964). Nevertheless, this danger is minimal where, as in the instant case, the declarant is accompanied in the criminal enterprise by a number of other individuals. Indeed, with this many alleged accomplices—none of whom were on trial with Street—, the prosecution could have substituted some-

[13] "Nor was an effort made to limit prejudice to the defendant by redacting incriminating portions of the confession. From an examination of the confession, this could have been done without detracting from the alleged purpose for which the confession was introduced." *State* v. *Street*, 674 S.W.2d 741, 745 (Tenn. Crim. App. 1984).

thing like "another fellow" for all the names and the jury would not have inevitably concluded that any particular reference was to Street.

Moreover, analysis of the declared purpose underlying admission of Peele's confession reveals that redaction of the portions of the statement which seriously inculpated Street could have been accomplished without frustrating the State's aim. The jury did not need to be enlightened by Peele's detailed declarations regarding Street's alleged role in the crime in order to appreciate that Peele's confession made no reference to whether: (1) a light had been on in Tester's house prior to the burglary; (2) Tester's shirt had been ripped; (3) a nylon rope had been used in the hanging; (4) a gag had been made from a torn bed sheet; (5) Tester's wallet had been located in the front bedroom; (6) money had been taken from Tester's wallet; or (7) shirts had been taken from the residence. (J.A. 303-304)

In fact, the parties began with an understanding that the State would employ the substantial equivalent of redaction: testimony concerning selected portions of the Peele confession. Sheriff Papantoniou was to read Peele's statement to himself and then, through questioning, highlight the differences between it and Street's statement without reading the former to the jury. (J.A. 293-94) The prosecution later reneged, however, deciding that it would be "more coherent" for the Sheriff to read the full confession to the jury. (J.A. 295) Yet, after the witness laid the whole of Peele's statement before the jurors, the prosecution had Sheriff Papantoniou underscore these differences—thereby accomplishing exactly what it could have done without such grave prejudice to Street, simply by observing the original arrangement. (J.A. 303-04) "One cannot help but conclude," as the Tennessee Court of Criminal Appeals stated, "that introduction of this unedited confession was merely a transparent attempt to condemn defendant from another source without allowing the veracity of the source or the confession to be tested by cross-examination." 674 S.W.2d at 745-46.

In sum, the instant case presents a clear *Bruton* violation: introduction of an unredacted confession by an absent alleged accomplice, which gravely incriminated the accused. The State's assertions that Street in effect "waived" his right to confrontation[14] and that only admission of Peele's entire confession at trial could unmask Street's purported lies, find no support in law or in fact.

The "sword-shield" decisions of this Court have never gone so far as to sanction impeachment through evidence as inherently unreliable as a co-conspirator's incriminat-

---

[14] The State, in passing, mentions that at one point in its case in chief respondent sought to have Peele's statement received in evidence. Brief for Petitioner at 5; *see also Amicus Curiae* Brief for the United States at 17 n.12. Clearly, Street's unsuccessful attempt did not "open the door" to its later admission as a matter of state law, since the Tennessee Court of Criminal Appeals held for respondent.

Nor as a matter of federal law should that circumstance affect the outcome here. As the Solicitor General concedes, at that stage Street "presumably still expected . . . that Peele would be called as a prosecution witness," *id.*, in which event respondent had nothing to lose by offering the statement himself, for whatever it was worth on the "parroting" defense. For if Peele, as could be anticipated, repeated his incriminating story on the stand, the introduction of the earlier confession would not have prejudiced Street. Naturally, when it became clear that the State wanted to use only Peele's confession, not Peele himself, Street could reasonably decide that the balance of advantage lay in asserting his confrontation rights so as to exclude the devastating statement. *Cf. Nelson* v. *O'Neil*, 402 U.S. 622 (1971); *California* v. *Green*, 399 U.S. 149 (1970) (no confrontation problem exists where prior statement of declarant-witness is admitted at trial).

ing extrajudicial confession to the authorities: a confession immune from traditional adversarial testing. Unlike the cases where a defendant's perjury could be revealed by exposure of his own prior inconsistent statements or conduct, by tangible evidence, or by declarations containing some other guarantee of veracity, here the admission of Peele's confession did not necessarily unveil perjury. At best, the evidence provided the jury with a *possible* alternate version of the events leading up to Street's statement. Indeed, the discrepancies between Street's and Peele's confessions are wholly consistent with Street's assertion that, in addition to being forced to parrot Peele's declarations, he deliberately concocted portions of his own statement. (J.A. 195, 212, 218-221) *See* Brief for Petitioner at 18 n.9.[15]

Moreover, as has been amply demonstrated (*see supra* at pp. 24-28), several other viable methods of attacking Street's testimony would not have entailed so sweeping an incursion on his constitutional right to confront the witnesses against him. Armed with the favorable testimony of three law enforcement officers, the State simply had no need (assuming need could ever provide a justification) to run roughshod over Street.

Accordingly, adoption of the State's argument would not advance the search for truth. Instead, it would penalize this respondent's—and also chill future defendants'—invocation of the right to testify by gratuitously depriving Street, as well as others in his position, of the vital protection of confrontation.

---

[15] The fact that Street never contended that the Sheriff "fed" him Peele's whole confession reduced the value to the State of detailing each divergence between the two statements.

III. Respondent's Conviction Cannot Be Upheld Under Either The Doctrines Of "Interlocking Confessions" Or Harmless Error.

The Tennessee Court of Criminal Appeals correctly declined to sustain Street's conviction by applying either the doctrine of "interlocking confessions"[16] or the doctrine of harmless error. The court suggested the doctrine of interlocking confessions applies only to *joint* trials where "policy arguments favoring judicial economy and efficiency allow admission against the confessor." *State* v. *Street*, 674 S.W.2d 741, 746 (1984). In any event, the court held, the statements of Peele and Street did not, as a matter of Tennessee law, "interlock." *Id.* Finally, the court rejected the argument that Street's guilt had been so overwhelmingly proved as to make it clear beyond a reasonable doubt that the *Bruton* violation had had no effect on the verdict, and was therefore harmless. Analysis of the relevant authority amply confirms the conclusions of the court below. As an initial matter, however, this Court lacks jurisdiction to overturn that court's interlocking confession holding since it plainly rests on an adequate and independent state ground.

A. Since The Tennessee Court Of Appeals Relied On Tennessee Law In Finding Peele's And Street's Statements To Be Non-Interlocking, This Court Has No Jurisdiction To Review The Issue.

In the recent opinion of *Michigan* v. *Long*, ___ U.S. ___, 103 S.Ct. 349 (1983), the Court established the governing framework for analyzing claims that a state court decision is based, either in whole or in part, on an adequate and independent state ground. Speaking

---

[16] *See Parker* v. *Randolph*, 442 U.S. 62 (1979) (plurality decision). *See infra* at pp. 34-42 for discussion of that doctrine and the difficulty of ascertaining its meaning and its limits.

through Justice O'Connor, the Court reaffirmed its commitment to the basic principle that where such a ground exists, the Court's "jurisdiction fails." 103 S.Ct. at 3474 n.4. The "adequate ground" doctrine does not apply, however, when the state court's holding "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the record." *Id.* at 3476. Thus, in *Long*, where the Michigan court's opinion did not cite "a single state case" to support its holding that the car search in question "was unconstitutional" and its references to the state constitution did not indicate that the decision "rested on grounds . . . *independent* from" that court's "interpretation of federal law," this Court rejected the defendant's jurisdictional argument. *Id.* at 3477-78.

Here, by contrast, in refusing to credit the State's assertion that the interlocking confession doctrine precluded application of *Bruton* to vitiate Street's conviction, the Tennessee Court of Criminal Appeals not only cited but also clearly relied primarily, if not wholly, on Tennessee law.[17] The sole federal case mentioned by the court in this connection (except *Bruton*) was this Court's plurality decision in *Parker* v. *Randolph*, 442 U.S. 62 (1979).

In *Parker*, four members of the Court, with four others in disagreement, for the first time announced an approach to "interlocking confessions" by co-defendants other than the traditional inquiry into harmless error. *Id.* at 72-76.[18]

[17] In his brief to the Tennessee Court of Criminal Appeals, Street alleged a violation of both the sixth amendment and Tennessee Constitution art. 1, sec. 9 (containing, *inter alia*, state equivalent of confrontation clause). Brief for Appellant, *State* v. *Street*, at 5.

[18] The Chief Justice as well as Justice Stewart and White joined Justice Rehnquist's opinion for the plurality on this point. Justices

Cf. Brown v. *United States*, 411 U.S. 223 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969) (all cases dealing with *Bruton* violations under the "harmless error" rubric). Tennessee, however, like some other jurisdictions, had already adopted its own version of an interlocking confession exception to the *Bruton* rule a number of years before *Parker*, beginning with the case of *O'Neil* v. *State*, 455 S.W.2d 597 (Tenn. Crim. App. 1970). *See State* v. *Elliot*, 524 S.W.2d 473, 477-78 (Tenn. 1975) (citing *inter alia*, *O'Neil*). *See generally Stanbridge* v. *Zelker*, 514 F.2d 45, 49-50 (2d Cir. 1975), *cert. denied*, 423 U.S. 872 (1975); *Metropolis* v. *Turner*, 437 F.2d 207, 208 (10th Cir. 1971); *Rachel* v. *Commonwealth*, 523 S.W.2d 395, 399-400 (Ky. App. 1975) (all recognizing an interlocking exception prior to *Parker*). Indeed, in *Parker*, the Supreme Court of Tennessee had reversed the Court of Criminal Appeals in reliance upon *O'Neil* and its progeny. Appendix to Briefs for Petitioners and Respondents, *Parker* v. *Randolph*, at 227-46.

Significantly, although remarking preliminarily that the State placed heavy reliance on the doctrine "set forth in *Parker* v. *Randolph*," the court below prefaced its substantive discussion of the possible applicability here of the interlocking confession doctrine exception with the qualifying words: "In Tennessee . . ." 674 S.W.2d at 746. The opinion then quoted at some length from the leading Tennessee case on the subject, *State* v. *Elliot*, 524 S.W.2d 473 (Tenn. 1975), analyzing the present facts in terms of *Elliot* and another Tennessee decision, *State* v. *Robinson*, 622 S.W.2d 62 (Tenn. Crim. App. 1980).

Stevens, Brennan and Marshall in dissent, and Justice Blackmun concurring in the result, declined to create a separate doctrine for confessions that "interlock." Justice Powell took no part in the consideration or discussion of the case.

With respect to the issue of interlock, *Elliot* cited only state precedent. Moreover, none of the reported post-*Parker* cases on this subject in Tennessee, including *Robinson*, refer to any federal cases except, occasionally, to *Parker* itself. These references, however, are limited to discussion of the State's contentions or the constitutionality, in general terms, of an interlocking confession exception. Furthermore, no detailed analysis of what types of statements, in particular circumstances, do or do not interlock is based in any way on *Parker*. *See State* v. *Simon*, 635 S.W.2d 498, 504 (Tenn. 1982); *State* v. *Street*, 674 S.W.2d 741, 746 (Tenn. Crim. App. 1984); *State* v. *Burtis*, 664 S.W.2d 305 (Tenn. Crim. App. 1983); *State* v. *Painter*, 614 S.W.2d 86, 89 (Tenn. Crim. App. 1981); *see also State* v. *Robinson*, 622 S.W.2d at 71.

In the language of *Long*, therefore, not only did the Tennessee court's decision not "rest primarily" (or, indeed, at all) on federal law, but also it was in no way "interwoven with the federal law." 103 S.Ct. at 3476. Furthermore, because the interlocking confession doctrine *qualifies* a defendant's rights, the Tennessee case plainly have not been shaped by any perceived compulsion of "federal constitutional considerations." *Id.* at 3474 n.4. Rather, the opinion of the court below rests on independent and adequate state grounds. For that reason alone, this Court must decline to disturb the Tennessee Court of Criminal Appeals's holding that Peele's statement did not so "interlock" with Street's as to bar the application of *Bruton*.

B. The Court Should Decline To Adopt The *Parker* Plurality's Exception To *Bruton* For Interlocking Confessions, Especially Where—As In Street's Case And Not In *Parker*—The Defendant Is Being Tried Alone And Introduces Evidence To Attack His Confession. Instead, The Court Should Continue To Adhere To Traditional Harmless Error Analysis.

In *Parker*, the non-testifying co-defendants had each confessed to their role in the crime. In upholding their convictions, the plurality reasoned that in the situation where there are "interlocking confessions" the co-defendants' incriminating statements will seldom be so "devastating," nor limiting instructions so inadequate, as to call for preclusion under *Bruton*. Writing for the Court, Justice Rehnquist stated that "admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution." 442 U.S. 73-76, citing *Bruton*. The three dissenters, in an opinion by Justice Stevens, as well as Justice Blackmun, who authored a separate opinion, all departed from the plurality's interlocking confession analysis. Agreeing that the case should be subjected to ordinary "harmless error" scrutiny, they differed only in their conclusions whether any *Bruton* violation had in fact affected the verdict.

Although many of the lower courts have apparently accepted the *Parker* approach,[19] respondent urges that the Court decline to extend majority endorsement to that decision. The exception for interlocking confessions in-

---

[19] Some courts have, however, rejected the plurality's reasoning in *Parker*. *See United States* v. *Parker*, 622 F.2d 298 (8th Cir.), *cert. denied sub nom. Ward* v. *United States*, 449 U.S. 851 (1980); *Earhart* v. *State*, 48 Md. App. 695, 429 A.2d 557 (1981); *State* v. *Rodriguez*, 226 Kan. 558, 601 P.2d 686 (1979).

troduces confusion into the law, with a consequent threat to the safeguard embodied in *Bruton*. Furthermore, there is little countervailing benefit since harmless error analysis under cases like *Harrington* v. *California*, 395 U.S. 250 (1969), serves any legitimate purpose sought to be achieved by an interlocking confession exception. In fact, Justices Blackmun, Stevens, Brennan, and Marshall, in their *Parker* opinions have already given all or most of the reasons for refusing to create an idiosyncratic loophole for cases, otherwise clearly governed by *Bruton* and the *Harrington* line, where the defendant himself has made an inculpatory statement.

For one thing, as evidenced by the wide diversity in lower court approaches to the interlocking confession doctrine, there exists very little agreement about the degree to which the admission must "interlock" before *Bruton* is deemed inapplicable. Some courts, for example, have required only that the confessions be "substantially similar" (*United States* v. *Spinks*, 470 F.2d 64, 66 (7th Cir.), *cert. denied*, 409 U.S. 1911 (1972); *see Tamilio* v. *Fogg*, 713 F.2d 18, 20-21 (2d Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 706 (1984)) or do not contradict each other. *See, e.g., Jones* v. *State*, 227 So.2d 326, 328 (Fla. Dist. Ct. App. 1969).

Other courts have limited application of the doctrine to situations in which the co-defendant's confession does not implicate the defendant to any greater extent than his or her own statements. *E.g., Rachel* v. *Commonwealth*, 523 S.W.2d 395, 399-400 (Ky. App. 1975). Indeed, this is the law in Tennessee. *State* v. *Elliot*, 524 S.W.2d 473, 477-78 (Tenn. 1975). Still other courts have required that the confessions "dovetail in all the particulars." *Metropolis* v. *Turner*, 437 F.2d 207, 208 (10th Cir. 1971). The *Parker* plurality, on its own part, "simply assume[d] the interlock" in that case, without determining "what an 'interlock' is." 442 U.S. at 80 (Blackmun, J., concurring in part); *id.* at 82 n.2 (Stevens, J., dissenting).

It perhaps is not surprising, therefore, that the Court when first confronted with the "interlock" situation did not embrace the exception by a majority or seek to define the term "interlocking confessions." Regardless, fashioning a definition in this case would simply risk replacing a vague and uncertain doctrine with law that, while conceivably clearer, would provide a poor substitute for *Bruton*'s protection of defendants' confrontation rights which is as sensibly and traditionally qualified as the harmless error principle. On the one hand, should the Court adopt a weak "similarity" or "substantial consistency" test like the one apparently urged by the State (Brief for Petitioner at 21-22), *Bruton* will be "seriously undercut"—and for no good reason. 442 U.S. at 82-83 (Stevens, J., dissenting). As the *Parker* dissent aptly pointed out, there is no basis for believing that "the jury's ability to disregard a co-defendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant." *Id.* at 84. If anything, intuition suggests the very opposite is likely: that jurors will allow the accomplice's confession to infect their determination of a confessing defendant's guilt or innocence because they will regard each set of admissions as reinforcing each other.

Further, although in some circumstances the incriminating statements of a co-defendant will not "be of the 'devastating' character referred to in *Bruton* when the incriminated defendant has admitted his own guilt," in other situations the non-testifying confessor's statement may, indeed, lend " 'substantial, perhaps even critical, weight to the Government's case.' " *Parker* v. *Randolph*, 442 U.S. at 72-73, .quoting *Bruton* v. *United*

States, 391 U.S. at 128. Whatever the exact meaning of "interlock," common sense and experience support the insight that few, if any, interlocking confessions will harmonize wholly. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at trial. In addition, "[a]lthough two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's co-defendant"—as the present set of facts well illustrates. 442 U.S. at 79 (Blackmun, J., concurring). To the extent that this Court permits a co-defendant's similar but not identical confession to be received at a confessing defendant's trial, that defendant will incur the very prejudice the *Bruton* rule was designed to avoid.

On the other hand, if the Court should espouse a strict test of what constitutes interlocking confessions—one that reflects more fully the letter and spirit of *Bruton*—it is far from clear how the interlock issue would relate to the question of harmless error. At best, it appears, the inquiries would merge, thus rendering the interlock standard superfluous. Alternatively, the trial courts would face a two-step determination (first interlock, then harmless error) which would only lend itself to lack of clarity and inefficiency. 442 U.S. at 80-81 (Blackmun, J., concurring). At worst, to avoid such duplication, a judge may simply "throw up his hands" and decide that the statements interlocked where the issue was doubtful. That result would not only curtail seriously the accused's right of confrontation but would also set aside the generally protective approach to constitutional safeguards embodied in *Chapman* v. *California*, 386 U.S. 18 (1967) (to avert reversal, constitutional error must be "harmless beyond a reasonable doubt"), and this Court's other harmless error decisions. *Id. Cf. Harrington* v. *California*, 395 U.S. 250 (1969) (the untainted evidence must be "overwhelming").

In sum, this Court should adhere to the view shared by the dissent (Justices Stevens, Brennan, and Marshall) and Justice Blackmun in *Parker:*

> I would not adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the confrontation clause protects.

442 U.S. at 79 (Blackmun, J., concurring). But regardless of the overall approach the Court opts to follow, it plainly should not adopt an exception to *Bruton* for interlocking confessions in the case of a lone defendant, like Street, who takes the stand in order to repudiate his own admissions.

First, any policy considerations supporting introduction of co-defendants' confessions incriminating other defendants do not apply outside the context of joint trials: the setting in both *Bruton* and *Parker*. As the Tennessee Court of Criminal Appeals noted, considerations of "judicial economy and efficiency" militate in favor of using such confessions where, for these same practical reasons, the State is proceeding against several defendants in one proceeding and each defendant is necessarily "unavailable" for confrontation by the others unless he freely chooses to testify. *State* v. *Street*, 674 S.W.2d 741, 746 (Tenn. Crim. App. 1984).

The instant case involved no joint trial dilemma. Peele was not "unavailable" for purposes of confrontation. Moreover, the prosecution in *Street* had already accomplished what the prosecution in *Parker* was seeking: admission of the confession of the statement-maker *against the statement-maker*. Street's statements had

already been entered into evidence when the prosecution was also allowed to read Peele's entire confession to the jury.

This distinction is critical when reviewing the State's assertion that the jury was not faced with an "overwhelming task" similar to that presented in *Bruton* and *Douglas* regarding the ability to ignore an incriminating confession. Brief for Petitioner at 16. In *Bruton*, *Douglas*, and *Parker* the jury was being asked to apply an extrajudicial confession *against the statement-maker* only. The "mental gymnastic"[20] required of the jury was obedience of the admonition not to apply the accomplice's confession to the defendant. In the instant situation, though, the jury as specifically invited to employ Peele's confession against Street. Indeed, they were asked to first analyze its contents and then gauge Street's credibility. It is submitted that, once the jury is asked to apply the extrajudicial statements against the *non-statement maker*, the ability to "segregate evidence into separate intellectual boxes," *Bruton*, 391 U.S. at 131, is an overwhelming task despite the issuance of cautionary limiting instructions. This is particularly true when there is only one defendant against whom the jury can apply the incriminating confession.

Second, the Court should not broadly embrace the *Parker* plurality decision so that it applies to instances, like the present case, where the defendant introduces evidence repudiating his earlier confession and offers a defense to the charges. Indeed, *Parker* itself does not appear to sanction application of an interlocking con-

---

[20] In *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) Judge Learned Hand criticized the proposition that a jury could engage in the "mental gymnastic" of disregarding inadmissible hearsay simply because they are instructed to do so.

fession exception under these circumstances. Justice Rehnquist observed that the right to confront and cross-examine adverse witnesses would likely prove of little value to a person "whose own admission of guilt stands before the jury *unchallenged*." 442 U.S. at 73 (emphasis added). Such a defendant, apparently, is unlikely to suffer the type of "devastation" envisioned by *Bruton* from the introduction of his alleged accomplice's statements. *Id.*

Here, in contrast to the *Parker* defendants, Street took the stand and testified at length to contest the validity of his confession and to assert an alibi defense. Different as it is factually, this case should also be legally distinguished from the situation where the defendant permits his own confession to be spread before the jury without attacking its validity or substance, yet seeks only to protest the admission of his accomplice's incriminating statements.

First, Street challenged the voluntariness and reliability of his confession directly through his own testimony and indirectly through the presentation of thirteen witnesses who corroborated his alibi defense. (J.A. 86-160) Therefore, Street demonstrated a need to cross-examine the absent Peele in an effort to "shake" his accuser's story. Second, Street's repudiation of his own statement reduced Peele's confession to its presumptively "suspect" status since it no longer stood corroborated by the defendant. *Cf. Parker* v. *Randolph*, 442 U.S. at 73. Further, the fact that Street put on an alibi defense, coupled with a broadside attack on his prior admissions, necessarily rendered Peele's confession much more "devastating" than the unchallenged co-defendants' confessions at issue

in *Parker*.[21] As previously observed, Peele's confession served as a substantive rebuttal of Street's alibi defense and constituted significant corroboration of the State's theory of the case.

Accordingly, the Court should decline the State's invitation to "clarify" the interlocking confession doctrine of the *Parker* plurality. Brief for Petitioner at 20. As has been convincingly shown, the adoption of this open-ended exception to the rule of *Bruton* threatens defendants' legitimate rights of confrontation without producing any corresponding benefit, in terms of improving or rationalizing the law in this area or even easing its administration. The Court should, therefore, proceed to analyze the present case under the harmless error rule.

C. The Error In Admitting Peele's Unredacted Confession Was Not Harmless, Nor Did Peele's And Street's Confessions Interlock Sufficiently To Obviate The *Bruton* Error.

The Tennessee Court of Criminal Appeals expressly held that the confrontation violation here did not amount to harmless error. *State* v. *Street*, 674 S.W.2d 741, 747 (Tenn. Crim. App. 1984). Interestingly, the State does not dispute this holding. This Court, moreover, should be loathe to second-guess such primarily factual findings by lower courts. *See generally* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.34 at 245 (5th ed. 1978); *cf. id.* § 5.15, at 370-73 (certiorari may be

[21] The dissenters in *Parker* disapproved the suggestion that a defendant's exercise of his fifth amendment privilege not to testify strengthened the justification for adoption of an interlocking confession doctrine. Respondent agrees with this approach. Nevertheless, if any distinctions are to be drawn, a defendant in Street's position presents the most compelling case for refusing to apply an "interlock" exception.

deemed improvidently granted when the case turns on questions of importance only to the litigants).[22]

As previously noted, the Tennessee court resolved the "interlock" issue in favor of Street on state law grounds and therefore cannot be reversed on that issue. Even upon independent examination, however, the Court should conclude that neither the harmless error nor the interlocking confession doctrine can be used to sustain Street's conviction. The same considerations support the inapplicability of both doctrines.[23]

In reliance upon Tennessee precedent, the Court of Criminal Appeals held that even if the interlock exception applied outside the joint trial setting, it did not cover the case of Street, whose alleged accomplice made him a "much more principal actor" in the crime than did his own admissions. 674 S.W.2d at 746. According to that court, where the

> confession of one non-testifying codefendant contradicts, repudiates, *or adds to material statements* in the confession of the other non-testifying codefendant, *so as to expose the latter to an increased risk of conviction* or to an increase in the degree of the offense with correspondingly greater punish-

[22] Notably, in all three cases in which this Court held that a *Bruton* error was harmless, it did not overturn the opposite findings of a lower court. *See Brown* v. *United States*, 411 U.S. 223 (1973); *Harrington* v. *California*, 395 U.S. 250 (1969); *cf. Schneble* v. *Florida*, 405 U.S. 427 (1972), *affirming* 215 So. 2d 611 (Fla. 1968) (Florida court found no error).

[23] The State urges adoption and application of the interlocking confession doctrine herein because of the remarkable similarities between the confessions. Curiously, however, the State concurrently maintains that the confessions are so dissimilar that admission of Peele's statement was necessary lest Street be allowed to perjure himself with impunity.

> ment, the latter codefendant is entitled to test the veracity of the statements in the confession of his codefendant. A denial to him of his right through the failure of his codefendant to take the stand brings the *Bruton* rule into play.

674 S.W.2d at 746, quoting *State* v. *Elliot*, 524 S.W.2d 473, 478 (Tenn. 1975) (emphasis added). Unquestionably, Peele's confession added to Street's in a way that increased the latter's risk of being convicted of murder in the first degree.

Peele's confession portrayed Street as a principal actor and as a willing participant in the killing. Street's confession, on the other hand, suggested that he was not willing to "whip" the victim. (J.A. 354) Furthermore, as noted by the Court of Criminal Appeals, Street stated that he kept telling Peele to leave but that Peele insisted on the hanging. 674 S.W.2d at 746. Street claimed not to participate in the hanging but Peele's confession indicated that Street helped place the rope around Tester's neck and also helped lift the victim off the truck's tailgate. (J.A. 302) Plainly, Peele's confession depicted Street much less favorably than Street's own contested statement. Furthermore, it added significantly to the risk that Street would be convicted because it was the most prominent evidence possessed by the State which was corroborative of Street's declarations.

Moreover, in the words of the Tennessee Court of Criminal Appeals:

> Peele's statement not only implicated the defendant, it alone could establish all essential elements of the homicide, had the jury chosen to believe defendant's confessions were in fact involuntary.

State v. *Street*, 674 S.W.2d at 747. Hence, under the Tennessee test for interlocking confessions (which this

Court should adopt if it chooses to recognize such an exception), the introduction of Street's admission did not dispense with the need to exclude Peele's more damning accusations because the latter did not "interlock" with the former.

Without Peele's confession, the State lacked the overwhelming evidence of guilt necessary for reversal on the basis of harmless error. The State's case rested primarily on Street's statements (Brief for Petitioner at 3), but this evidence was heavily contested by both the alibi witnesses and Street's own testimony. *Cf. Brown* v. *United States*, 411 U.S. 223 (1973); *Harrington* v. *California*, 395 U.S. 250 (1969) (in both cases, eyewitnesses placed the respective defendants at the scene of the crime); *see also Schneble* v. *Florida*, 405 U.S. 427 (1972) (the codefendant's statement was only mildly incriminating, corroborating some of the details of the defendant's own confession).

Street's claim is simple and compelling. *Bruton* precluded the introduction of the absent, unreliable Peele's confession incriminating Street. That confession did not interlock with Street's own admissions under Tennessee law, a circumstance that should be dispositive in Street's favor on this issue. In any event, the statements should not, in any event, be held interlocking as a federal matter if the Court elects to adopt the plurality appraoch in *Parker* v. *Randolph*, 442 U.S. 62 (1979). Lastly, by no stretch of the imagination could the error in receiving Peele's confession be deemed harmless. On the contrary, it served as the State's most powerful attack on Street's alibi defense. Its author, however, unlike Street, was immune from cross-examination.

CONCLUSION

The judgment of the Tennessee Court of Criminal Appeals should be affirmed.

Respectfully submitted,

STUART HAMPTON
Counsel of Record
(Appointed by this Court)
630 Elk Avenue
Elizabethton, Tennessee 37643
(615) 543-6000

LANCE J. ROGERS
310 Hedge Street
Charlottesville, Virginia 22901

VIVIAN BERGER
435 W. 116th Street
New York, New York 10027
Counsel for Respondent

FOR ARGUMENT

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court Of
Criminal Appeals Of Tennessee At Knoxville

REPLY BRIEF FOR THE PETITIONER

W. J. MICHAEL CODY
Attorney General of Tennessee
Counsel of Record

ROBERT A. GRUNOW
Associate Chief Deputy
Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court Of
Criminal Appeals Of Tennessee At Knoxville

REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN RESPONSE TO BRIEF FOR THE RESPONDENT

A. The Factual Circumstances Of This Case Far Remove It From Those Presented In Douglas And Bruton, Compelling A Different Result.

In both *Bruton v. United States,* 391 U.S. 123 (1968), and *Douglas v. Alabama,* 380 U.S. 415 (1965), the Court concluded that the codefendants' confessions were so "crucial" and "devastating" that the juries in those cases could not be expected to ignore the confessions in determining the guilt of the non-confessing defendants. Thus, notwithstanding limiting instructions or technical evidentiary rules, the confessions were deemed to have been considered for the truth of the matters asserted

therein. At that point, in the factual contexts of *Bruton* and *Douglas,* the principles of the Confrontation Clause came into play.

The respondent in his brief addresses at length the "principles of confrontation," including availability of the out-of-court declarant, reliability of the declarant's statement, and utility of cross-examination. This discussion necessarily and incorrectly assumes that the jurors in the instant case disregarded the limiting instructions of the trial judge and considered Peele's statement for its truth. On this point, the respondent asserts that "[t]here is . . . no relevant distinction between the instant situation and *Bruton* that would allow for a different result in the two cases." Brief for the Respondent at 14. The respondent also relies heavily on *Douglas* as a controlling precedent, as did the Court of Criminal Appeals.

The State has no argument with the respondent's discussion of "confrontation principles," nor do we contest their applicability in cases like *Bruton* and *Douglas* where there is a substantial risk that the codefendant's confession will be improperly considered for its truth. However, we seriously question the respondent's attempt to extend the *Bruton* and *Douglas* holdings far beyond the unique facts of those cases, on the threshold issue of whether, in this case, "[i]t is not unreasonable to conclude that . . . the jury can and will follow the trial judge's instructions . . . ." *Bruton,* 391 U.S. at 135.

To answer the respondent's assertions about the ability of the jury to limit its consideration of Peele's confession, and therefore the applicability of the Confrontation Clause, we will recapitulate the key factual distinctions between this case and *Bruton* and *Douglas.*

1. Unlike the defendants in *Bruton* and *Douglas,* Street had already "devastated" his alibi defense by his own "powerfully incriminating" confessions and statements, which included his admissions that he helped to plan the burglary, that he knew

that the "whipping" of the victim was a possibility, that he willingly participated in the burglary, that he was in the back of the truck when the victim was hanged, and that he had placed at least one of the loops of rope over the victim's head. (J.A. 75, 305, 353-358.)

The respondent counters that Peele's confession "portrayed Street as a principal actor and as a willing participant in the killing" as opposed to Street's claim that he was a mere accomplice and a somewhat reluctant participant. Brief for the Respondent at 42.[1] This is a far cry from the codefendants' confessions in *Bruton* and *Douglas,* which *by themselves* contributed critical elements to the prosecution cases.[2] Street's confessions, on the other hand, had already supplied a firm factual basis for a finding that he had at least aided and abetted premeditated first-degree murder, and the possibility that he had done so without reluctance or that he had been "more a principal actor" can hardly be considered to have been "devastating" to his case.[3] Moreover, the respondent has ignored the fact that he could have been found guilty on a felony murder theory, based simply

---

[1] In arguing this point, the respondent notes that Peele's confession "indicated that Street helped place the rope around Tester's neck . . . ." The respondent apparently has forgotten, as did the Court of Criminal Appeals, Street's June 27, 1982 confession in which he admitted placing a loop of rope around the victim's neck. (J.A. 74-76.)

[2] The codefendant's confession in *Douglas* was the only evidence that Douglas had actually fired the gunshot wounding the victim. 380 U.S. at 417. The codefendant's confession in *Bruton* appears to have been the only direct evidence that Bruton participated in the robbery. 391 U.S. at 124.

[3] As has been noted, Brief for the Petitioner at 2 n. 1, there was only one possible punishment for first-degree murder in this case, eliminating the possibility that mitigating circumstances could affect the jury's sentence. The respondent has never argued, nor could he do so convincingly, that his confession left open the possibility of a lesser degree of homicide.

on his participation in the burglary and without regard to the role he played in the killing itself.[4]

2. Also unlike the defendants in *Bruton* and *Douglas,* Street further minimized the potential impact of Peele's confession by informing the jury of its existence and of the fact that Peele had implicated Street in the murder. Defense counsel did so as early as the opening statement (R. III, 136), and Street reaffirmed it in his testimony (J.A. 190).

It seems intuitively true that most (if not all) of the impact of an accomplice's confession lies in the mere fact that the accomplice has named the defendant, particularly where the defendant claims alibi; the details of the confession are relatively insignificant, at least with respect to the defendant's guilt or innocence. With Street's revelation that Peele had confessed and named Street as an accomplice, the primary impact of Peele's confession was a *fait accompli.* The jurors, not surprised to discover that Peele had implicated Street, could more easily concentrate on the real import of the text of Peele's confession, i.e., whether it supported or belied Street's parroting claim.

The respondent argues that because he had challenged the voluntariness of his confession and raised an alibi defense, the substance of Peele's confession was all the more "devastating." Brief for the Respondent at 38-40. But it was Street who chose to stand or fall on the terms of Peele's confession, assuming the risk that his parroting claim would be legitimately "devastated" or "prejudiced" when the true terms of Peele's confession were revealed to the jury.[5] Thus this case can be fairly distinguished

[4] Interpretations of Tennessee's felony murder statute, Tenn. Code Ann. § 39-2-202(a), have generally followed traditional principles of felony murder. *See Farmer v. State,* 201 Tenn. 107, 114-117, 296 S.W.2d 879, 883-884 (1956).

[5] As this point illustrates, it was Street who wanted to "have his cake and eat it too," asking the jury to believe his parroting claim but prohibiting them from examining the best evidence of the veracity of that claim.

from those more routine cases in which a challenge to voluntariness does not bring into issue the very terms of an accomplice's confession.[6]

3. Another distinction between this case and *Bruton,* as noted in our main brief, is the fact that the jury could properly consider Peele's confession against Street under state evidentiary law, albeit for a limited purpose. The presumption that jurors are able to so limit their consideration of evidence is hardly novel, *see* I WIGMORE ON EVIDENCE § 13 (Tillers rev. 1983), and in fact is an underlying premise of the hearsay rule and other standards of evidence.

The respondent insists that it is just as difficult for jurors to limit their consideration of such evidence, Brief for the Respondent at 37-38, and again we must rely on intuition and human experience to analyze this claim. In *Bruton,* as well as in *Nash v. United States,* 54 F.2d 1006, 1006-1007 (2d Cir. 1932), the jurors were asked to use the evidence for two different purposes at different times in their joint deliberations; to consider the truth of the confession as to one defendant and to ignore it altogether as to the other. In the instant case, however, the jurors were required to use the evidence for a single purpose, evaluation of the parroting claim, throughout their consideration of the case. A presumption that jurors are unable to perform this simple task would have far-reaching consequences for the jury system as it now exists.

4. The manner of the introduction of the accomplice's confession provides another critical distinction between this case and *Bruton* or *Douglas.* In both of those cases the codefendants' confessions were placed before the jurors during the prosecu-

[6] Even if the plurality opinion in *Parker v. Randolph,* 442 U.S. 62 (1979), could be read to have limited its scope by its comment about a defendant's "unchallenged" confession, *id.* at 73, the distinction has no application in a case where, as here, the defendant has called into issue the terms of his accomplice's confession, thereby informing the jury of its existence.

tion's case in chief, along with other proof of the elements of the crime and the guilt of the defendant. In the instant case, on the other hand, Peele's confession was part of the State's rebuttal proof, emphasizing to the jurors that the confession was to be considered only as it impeached Street's parroting claim.

In addition, as has been pointed out by the United States as *amicus curiae,* Brief for the United States at 17-19, the prosecuting attorneys carefully focused both the examination of Sheriff Papantoniou and their closing arguments on the minor discrepancies that belied Street's parroting claim, and not on the incriminating nature of Peele's confession.

Finally, the trial court instructed the jury three times to limit its consideration of Peele's confession. While the respondent has declined to challenge the sufficiency of these instructions, Brief for the Respondent at 13 n. 6, it should be stressed that in each instance the court instructed the jurors not to consider Peele's statement for the truth of the matters asserted therein. (J.A. 292, 293, 350.)

5. Thus it can be seen that the factual differences between this case on the one hand, and *Bruton* and *Douglas* on the other, compel the conclusion that the jurors in the instant case could reasonably be expected to consider Peele's confession only for impeachment purposes, and not for the truth of the matters asserted therein. And once that conclusion has been reached, the respondent's contentions about availability, reliability, and the utility of cross-examination are irrelevant. Since it was the terms of Peele's confession, and not its truth, that was before the jury, nothing said by Peele himself could assist the jury in its

evaluation of the parroting claim, and there is no confrontation concern.[7]

B. Introduction Of The Entire Text Of Peele's Confession Was The Only Effective Method Of Impeaching The Parroting Claim.

The respondent suggests throughout his brief that the reading of the entire text of Peele's confession was not necessary to accomplish the State's purpose, impeachment of Street's parroting claim. He specifically puts forward three alternatives.

First, of course, the respondent asserts that Peele's confession should not have been introduced at all, since the State had already accomplished its impeachment through cross-examination of Street and the presentation of witnesses who were present at Street's confession. Brief for the Respondent at 16-17, 22-23. This argument is self-defeating, for if the State had so convincingly impeached Street, his guilt became a foregone conclusion, and it is difficult to see how Peele's confession could have made any difference, much less be "devastating." In any event, the State's witnesses all had vested interests in the outcome of the trial, and the State was entitled to resolve the "swearing contest" by introducing the best evidence of the veracity of the parroting claim, Peele's confession.

Second, the respondent suggests that Peele's confession could have been edited by substituting the term "another fellow" for all of the names of individuals besides Peele. Brief for the

---

[7] With respect to the nonissue of availability, we do not understand the respondent's indignation over the Solicitor General's reference to the reasons that Peele was not called by the State at trial, reasons which were well known to all of the parties. *See* Brief for the United States at 2 n. 1; Brief for the Respondent at 16 n. 7, 20 n. 11, 24-25. It is plain to us that the Solicitor General was not attempting to justify Peele's absence by asserting that he was "unavailable," but instead was making the opposite point that Peele was equally available to both sides. *See* Brief for the United States at 24.

Respondent at 25-26. Putting aside the respondent's failure to make such a suggestion in the state courts, this device would not have been effective to reduce the risk of improper inference by the jury. For example, Street had asserted in his confession of September 17, 1982 that he put the gag in the victim's mouth, Peele and Montgomery carried the victim out of the house, Street was in the truck with Peele while Montgomery climbed into the tree, and Peele placed the rope around the victim's neck after Montgomery handed the rope down from the tree. (J.A. 358.) Peele's confession, as redacted, would have stated in pertinent part (J.A. 302):

> *Another fellow* and I lifted Ben Tester up. *Another fellow* had a piece of cloth, white, that he gagged Ben Tester with. When *the other fellow* gagged Ben Tester he tied the knot behind his head. . . . *Another fellow* and I got Ben Tester by the shoulders. *Two other fellows* got him by the feet. We four picked Ben Tester up and carried him out the front door. . . . We laid Ben Tester down on the tailgate. *Another fellow* and I got up in the truck bed. *Two other fellows* climbed up in the tree. *Another fellow* handled the rope . . . and tied it off with a knot. . . . *Another fellow* and I put the loops around Ben Tester's head and down around his neck. *Another fellow* and I lifted Ben Tester off the tailgate. . . . *Two other fellows* got out of the tree.

No reasonable juror would be fooled by such a redaction, concluding for example that Street was Peele's assistant in the hanging since the other two fellows (whom the juror knows to have been Montgomery and Causby, per Street's confession) were still in the tree. Indeed, it seems that the greater danger is that a juror might assume that Street was the "other fellow" more often than he really was, to Street's prejudice.

Finally, the respondent suggests that the trial court could have redacted from Peele's confession only those portions which "seriously inculpated Street," pointing out seven items

absent from Peele's confession but present in Street's. Brief of the Respondent at 26-27. Of course, as we have argued, none of Peele's confession was "seriously inculpatory" in light of Street's own admissions. But in any event, this approach oversimplifies the task of comparing and contrasting the two lengthy confessions, and leaves open to dispute which portions of Peele's confession were "seriously inculpatory" of Street. Furthermore, some of the most crucial differences (impeaching Street's parroting claim) involved the execution of the murder itself.

C. Use Of The "Sword-Shield" Principle Is Not Inappropriate In The Instant Case.

To emphasize the inequity of Street's defensive technique, we noted in our main brief this Court's holdings which prohibit a defendant in certain circumstances from using his or her constitutional rights to pervert the truth-finding function of a criminal trial. Brief of the Petitioner at 18-20. The respondent's attack on this analogy to the "sword-shield" principle does not withstand analysis. *See generally* Brief of the Respondent at 18-22.

First, the respondent suggests that, like the ban on coerced statements, confrontation is an absolute right which can never be waived or restricted. This suggestion, however, flies in the face of the flexible approach the Court has taken toward the Confrontation Clause in cases such as *Dutton v. Evans,* 400 U.S. 74 (1970), *California v. Green,* 399 U.S. 149 (1970), and *Ohio v. Roberts,* 448 U.S. 56 (1980).

Second, the respondent asserts that the "sword-shield" principle applies only in cases where a constitutional right has been fashioned into a prophylactic rule of evidence, without regard

for the truthworthiness of the evidence.[8] This is simply not true. Consider, for example, the following language from *Michelson v. United States,* 335 U.S. 469, 479 (1948), which discussed when the prosecution may use character evidence against a defendant:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

Regardless of these technical matters, the most compelling reason for reversal of this case remains: It is inherently inequitable, and damaging to the truth-finding process, to allow a defendant such as Street to call into issue the terms of a document, literally inviting comparison, but then to permit him to prevent revelation of the document to the jury on the ground that he cannot irrelevantly confront its author.

D. The Decision Of The Court Of Criminal Appeals Was Not Based On An Adequate And Independent State Ground.

The respondent asserts that the decision of the Court of Criminal Appeals, to the extent that it is based on the "interlocking confessions doctrine," is somehow based on an adequate and independent state ground, depriving this Court of jurisdiction. Brief for the Respondent at 29-32. This argument

---

[8] The respondent suggests that "shields" such as that provided by *Miranda v. Arizona,* 384 U.S. 436 (1966), "notably do not enhance, and in fact are frequently hostile to, the quest for truth." Brief for the Respondent at 21. This is a surprising assertion in light of the following language in *Miranda,* 384 U.S. at 466:

> That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court.

Significantly, the *Miranda* violation in *Oregon v. Hass,* 420 U.S. 714 (1975), was the failure to provide a requested lawyer.

reflects a misunderstanding of the "interlocking confessions doctrine," as well as a misreading of Tennessee cases on the point.

As explained by the plurality opinion in *Parker v. Randolph,* 442 U.S. 62 (1979), a determination that a codefendant's confession "interlocks" with the defendant's is nothing more than a determination that the codefendant's confession is not "devastating" under *Bruton,* which is what the State has attempted to demonstrate here and in the lower court. Therefore any treatment of the issue must rely on *Bruton* and its parameters, or on cases which hold a state's constitutional confrontation guarantee to provide protections similar to or greater than the Sixth Amendment as interpreted in *Bruton.*

The firm federal constitutional basis for the decisions of Tennessee courts on this issue is unmistakable. The Court of Criminal Appeals in the instant case relied heavily on *Bruton* and *Douglas* in determining whether a confrontation violation occurred (Pet. App. at A-8 - A-10), and made no reference whatsoever to the Tennessee Constitution. The court turned next to this Court's opinions in *Parker,* but finding no guidance then turned to the opinion of the Tennessee Supreme Court in *State v. Elliott,* 524 S.W.2d 473 (Tenn. 1975).

It is difficult to understand how *Elliott* could be read as anything but an attempt to determine the parameters of *Bruton.* In its discussion of the confrontation problem, 524 S.W.2d at 477-478, the *Elliott* court mentioned only the federal constitutional confrontation provision, and referred to the "*Bruton* rule" no less than five times. When the court finally reached a harmless error finding, furthermore, it cited only this Court's opinion in *Harrington v. California,* 395 U.S. 250 (1969).[9]

---

[9] It is interesting to note that the Court of Appeals for the Sixth Circuit, in reviewing Otis Elliott's habeas corpus claim, also characterized the Tennessee Supreme Court's decision as having been based on *Bruton. Elliott v. Thompson,* 599 F.2d 767, 769-770 (6th Cir.), *cert. denied* 444 U.S. 932 (1979). Apparently there was no question that Elliott had "exhausted" the federal constitutional claim. *See Anderson v. Harless,* 459 U.S. 4 (1982).

Examination of the two state cases cited in *Elliott* confirms the federal basis for Tennessee's decisions on the subject. The court in *O'Neil v. State,* 2 Tenn. Crim. App. 518, 529-532, 455 S.W.2d 597, 602-604 (1970), based its discussion of the confrontation problem in that case solely on *Bruton* and the Sixth Amendment, as did the court in *Briggs v. State,* 501 S.W.2d 831, 835 (Tenn. Crim. App. 1973). We are aware of no Tennessee case that even cites to the applicable state constitutional provision in a *Bruton*-type situation, much less any suggestion that the Tennessee Constitution might provide an independent basis for a stricter application of the "interlocking confessions doctrine."[10]

Under these circumstances, it is obvious that the lower court decision in this case "fairly appears to rest primarily [if not exclusively] on federal law . . .." *Michigan v. Long,* 463 U.S. ____, ____, 103 S.Ct. 3469, 3476 (1983). Therefore the jurisdiction of this Court is clearly established.

[10] Indeed, we are unaware of any Tennessee case even suggesting the holding in *Bruton* would be required under the Tennessee Constitution.

CONCLUSION

The judgment of the Court of Criminal Appeals of Tennessee should be reversed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General of Tennessee

ROBERT A. GRUNOW
Associate Chief Deputy Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-7087
Attorneys for Petitioner